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In The

Supreme Court of the United States

October Term, 1990

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA, AND CMH ENTERPRISES, INC.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the Florida RICO Act, which prescribes a prison term of up to 30 years for two obscenity offenses, create an unconstitutional chill upon speech protected by the First Amendment?

2) Are the Florida criminal obscenity statutes unconstitutionally vague under the First and Fourteenth Amendments, where they codify the obscenity definition announced in *Miller v. California*, 413 U.S. 15 (1973), and fail to require proof that the disseminator knew the materials were legally obscene?

LIST OF PARTIES

Petitioners include all defendants in this action who were parties in the Florida Supreme Court, with the exception of Tommie Lynn Stall. Respondents to this petition therefore include the State of Florida and Tommie Lynn Stall. Corporate petitioner CMH Enterprises, Inc. has no parent or subsidiary companies required to be listed under Supreme Court Rule 29.1.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 3

REASONS FOR GRANTING THE WRIT 5

I. THE THREAT OF A THIRTY-YEAR PRISON TERM FOR TWO OBSCENITY OFFENSES IS INTOLERABLY CHILLING OF FREE SPEECH, AND CENSORIAL OFFICIALS MUST BE DENIED SUCH WEAPONS FOR SUPPRESSING VAST NUMBERS OF PROTECTED WORKS 10

A. The RICO Act's Speech-Chilling Penalties Render the Statute Overbroad and Facially Unconstitutional 10

B. There Is A Conflict Among The Circuits On The Question Of Whether The First Amendment Limits The Magnitude Of Penalties Which May Be Imposed For Obscenity Offenses 15

TABLE OF CONTENTS – Continued

Page

II. BECAUSE LEGAL AND SOCIAL CHANGES SINCE THIS COURT DECIDED *MILLER V. CALIFORNIA* HAVE ERODED ITS CENTRAL PREMISES, THE OBSCENITY STANDARD VIOLATES THE FIRST AMENDMENT AND DUE PROCESS, UNLESS THE COURT TEMPERS ITS VAGUENESS AND OVERBREADTH BY IMPOSING A MEANINGFUL SCIENTER REQUIREMENT 16

A. Subsequent Social and Legal Changes Have Steadily Eroded The Miller Court's Rationales For Criminalizing Obscenity 18

B. The *Miller* Test For Obscenity Has Become Increasingly Vague With The Advent Of The Video Revolution, Necessitating This Court's Reassessment Of Its Constitutionality 21

C. Because The *Miller* Standard Is Incurably Vague, A Meaningful Scienter Element Is Essential To Salvage Its Constitutionality .. 23

D. The *Miller* Doctrine Should Be Revisited By This Court Because It has Fallen Into Grave Disrepute..... 26

III. BECAUSE THE CHALLENGED CRIMINAL RICO PENALTIES AND THE *MILLER* DOCTRINE ARE CURRENTLY BEING EXPLOITED TO EFFECT WIDESPREAD CENSORSHIP OF PROTECTED MATERIALS, THIS CASE PRESENTS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH IS RIPE FOR RESOLUTION BY THIS COURT..... 29

TABLE OF CONTENTS – Continued

Page

CONCLUSION 30

APPENDIX

Appendix A: *Stall v. State*, 570 So.2d 257 (Fla. 1990)..... App. 1

Appendix B: *State v. Long*, 544 So.2d 219 (Fla. App. 2 Dist. 1989)..... App. 48

Appendix C: Order and Opinion of Polk County District Court (unpublished, January 8, 1988)..... App. 60

Appendix D: Order of Florida Supreme Court denying rehearing (unpublished, December 19, 1990)..... App. 92

Appendix E: Florida Obscenity Statutes, §§ 847.001-847.07 (West Supp. 1988)..... App. 94

Florida RICO Act, §§ 895.01-895.05 (West Supp. 1988)..... App. 112

Florida Criminal Penalties Provisions, Fla. Stat. Ann. §§ 775.082-775.083 (West 1976 & Supp. 1988)..... App. 128

TABLE OF AUTHORITIES

Page

Federal Cases

Boos v. Barry, 485 U.S. 312 (1988) 19

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 21

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) *passim*

Freedberg v. U.S. Justice Department, 703 F.Supp. 107 (D.D.C. 1988) 8

Hamling v. United States, 418 U.S. 87, 123 (1974) ..11, 23

J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 493-496 (1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 6, 15

Kolender v. Lawson, 461 U.S. 352 (1983) 22

McKinney v. Alabama, 424 U.S. 669 (1976) 25

Members of City Council of Los Angeles v. Taxpayers For Vincent, 466 U.S. 789 (1984) 12

Miller v. California, 413 U.S. 15 (1973) ..... *passim*

Near v. Minnesota, 283 U.S. 697 (1931) 30

New York v. Ferber, 458 U.S. 747 (1982) 11

New York Times v. Sullivan, 376 U.S. 254 (1964) 13, 14, 20, 24, 30

Osborne v. Ohio, ___ U.S. ___, 110 S.Ct. 1691 (1990) .19, 20

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 18, 19, 21, 25, 26, 27

PHE, Inc. v. U.S. Department of Justice, 743 F.Supp. 15 (D.D.C. 1990) 8

Playboy v. Meese, 639 F.Supp. 581 (D.D.C. 1986) 8

TABLE OF AUTHORITIES – Continued

Page

Polykoff v. Collins, 816 F.2d 1326 (9th Cir. 1987) .. 7, 15, 16

Pope v. Illinois, 481 U.S. 497 (1987) 28

Roth v. United States, 354 U.S. 476 (1957) .5-6, 13, 19, 27

Sable Communications, Inc. v. F.C.C., ___ U.S. ___, 109 S.Ct. 2829 (1989) 12

Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984)..... 11-12

Sherwin v. United States, 572 F.2d 196 (9th Cir. 1978)..... 24

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) 22

Smith v. California, 361 U.S. 147 (1959) ... 13, 14, 16, 24

Smith v. United States, 431 U.S. 291 (1977)..... 12

Stanley v. Georgia, 394 U.S. 557 (1969) 20, 27

Texas v. Johnson, ___ U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)..... 19

United States v. Eichman, ___ U.S. ___, 110 S.Ct. 2404 (1990)..... 19

United States v. Pryba, 900 F.2d 763 (4th Cir. 1990), *cert. den.* 111 S.Ct. 305 (1990) 6, 16, 29

United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988)..... 25

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-499 (1982)..... 23

Wayte v. United States, 470 U.S. 598 (1985)..... 26

Young v. American Mini Theatres, 427 U.S. 50 (1976) 21

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Sewell v. Georgia, 238 Ga. 495, 233 S.E.2d 187 (1978) 24

State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) 27, 28

State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) ...27, 28

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

Amendment I ..... *passim*

Amendment XIV, Section 1.....2, 18

STATUTES

18 U.S.C. § 1467..... 10

18 U.S.C. § 1963..... 10

28 U.S.C. § 2101(c) 2

FLORIDA STATUTES

§§ 775.082-775.083 (West 1976 & Supp. 1988).... *passim*

§§ 847.001-847.07 (West Supp. 1988)..... *passim*

§ 847.011 .....3, 24

§§ 895.01-895.05 (West Supp. 1988)..... *passim*

MISCELLANEOUS

Anderson, "2 Live Crew Acquitted," 76 *ABA Journal* 29 (December 1990)..... 9

"Art or Smut? Furor Stretches from Ohio to Florida," *Chicago Tribune* (October 4, 1990)..... 17

TABLE OF AUTHORITIES – Continued

Page

Attorney General's Commission on Pornography, *Final Report* (1986) 8, 20, 27

Carter, "Judge, Lawyers Try To 'Rap' Up Ex-Rated Trial; The 2 Live Crew Case," *Los Angeles Daily Journal* (October 16, 1990) 9

Groskaufmanis, "What Films We May Watch: Videotape Distribution and the First Amendment," 136 U.Pa.L.Rev. 1263 (1988) 7-8

Kristoff, "X-Rated Industry in a Slump," *New York Times* (October 5, 1986) 8

Los Angeles Times Magazine, February 17, 1991 7

"Man of Prayer Leads U.S. Anti-Pornography Crusade," *Denver Post*, (November 4, 1990) 9

"Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far From Their Home Bases," *Wall Street Journal* (July 27, 1990) 8

Petersen, "Showdown in Cincinnati," *Playboy* (March 1991) 17

President's Commission on Obscenity and Pornography (1970) 19

Majority Report 19

Minority Report 19

Schauer, "Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect,' " 58 B.U.L.Rev. 685 (1978) 11

"Scientists Trace Aberrant Sexuality," *New York Times*, January 23, 1990 20

Tribe, *American Constitutional Law* (1988) 21

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as *Stall v. State*, 570 So.2d 257 (Fla. 1990), and is reproduced as Appendix A. The court's unreported order denying rehearing appears as Appendix D. The Florida Court of Appeal's opinion is reported as *State v. Long*, 544 So.2d 219 (Fla. App. 2 Dist. 1989), reprinted as Appendix B. The unreported trial court opinion and order dismissing the information is reproduced as Appendix C.

JURISDICTION

The Florida Supreme Court filed its opinion in this matter on October 11, 1990, and denied Petitioners' motion for rehearing on December 19, 1990. Petitioners have filed this petition within 90 days of that date. The Florida Supreme Court's opinion constitutes a final judgment upholding the constitutionality of the Florida obscenity statute and the Florida RICO Act, § 895.01 et seq., with its potential 30-year prison term for as few as two obscenity violations. Accordingly, this Court has jurisdiction under 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF THE FLORIDA CODE

The relevant sections of the Florida Code, reproduced as Appendix E, include the following statutes: FLA. STAT. ANN. §§ 775.082-775.083 (West 1976 & Supp. 1988), §§ 847.001-847.07 (West Supp. 1988), and §§ 895.01-895.05 (West Supp. 1988).

STATEMENT OF THE CASE

Petitioner CMH Enterprises, Inc. is a Florida corporation which operates an adult bookstore in Polk County, Florida; the individual petitioners are all employees of that bookstore. On July 29, 1987, the Polk County, Florida district attorney filed a 47-count information charging petitioners with violations of the Florida obscenity statute, § 847.011,[1] and solely on that basis with violations of the Florida RICO Act as well.

Petitioners filed motions to dismiss in which they raised the issues they now assert in this Court, as well as state constitutional issues. The Polk County Circuit Court granted the defendants' motions and dismissed the information on January 8, 1988, concluding that the Florida obscenity statute violated both due process and the Florida Constitution's right to privacy, and that the RICO Act impermissibly chilled First Amendment rights. The trial court deemed the prevailing obscenity standard to be unconstitutionally vague in light of the unpredictability of obscenity determinations, the low level of scienter required, and the imprecision inherent in the various components of the *Miller* test, which the court concluded encourages arbitrary and erratic law enforcement. (App. C at 87-88.)

Under the RICO Act, which "carries a 30-year penalty," the trial court calculated that any of these defendants convicted of the RICO count and of the underlying obscenity counts as felonies would be sentenced to a guidelines-mandated 17 to 22 years. (App. C at 61.) The court concluded that the RICO Act as applied to obscenity "clearly has an unconstitutionally chilling effect on First Amendment rights."

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[1] The information did not allege that any of the materials at issue had previously been judicially determined to be obscene.

> "When the vagueness of the [obscenity test] is coupled with the low level of scienter required and the extremely severe penalties involved, the chilling effect of the RICO approach to obscenity becomes apparent.
>
> * * *
>
> "It is clear that this Act may be used not only to prevent the sale and exhibition of obscene materials by racketeers, but also to chill and dissuade any persons from distributing or exhibiting any and all sexually oriented or sexually explicit materials, including those that are constitutionally protected. Because of the extraordinarily severe penalties for guessing wrong, few individuals will be willing to accept the extreme penalty for a wrong guess." (App. C at 80-81.)

The State appealed to the Florida Court of Appeal, which reversed, upholding the obscenity statute as constitutional, without analysis. (App. B at 51.) The court also upheld the use of the RICO Act in obscenity cases, concluding it exerted no cognizable chilling effect, despite its threatened 30-year prison term, simply citing this Court's decision in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). (App. B at 58.)

Petitioners sought review in the Florida Supreme Court, which affirmed the Court of Appeal by a 5-2 vote. Primarily focusing on the question as to whether the obscenity statute violated the Florida Constitution's right to privacy, the court dispatched the issues raised here in only one paragraph, citing its earlier decisions upholding the obscenity statute and *Fort Wayne Books*: "If an obscenity statute is constitutional, RICO convictions based on that statute can be upheld." (App. A at 4.)

The two dissenting justices strongly rebuked the majority for failing to strike down both the obscenity statute and the RICO Act. Justice Rosemary Barkett observed that the obscenity offense,

"unlike all other crimes, depends, not on an objective definition obvious to all, but on the subjective definition first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case.

"Such a procedure runs counter to every principle of notice and due process in our society. . . . It would be legally indefensible in any other criminal context to respond that a crime is whatever a handful of people define it to be *after* the fact." (App. A at 15-16.)

Justice Kogan considered these statutes' chilling effect to be undeniable:

"Even a brief consideration of the majority opinion discloses how, in the real world beyond this courtroom, the chilling effect will be very severe indeed. Under the majority opinion, the possession or sale of "offensive" materials is equated with organized crime, drug smuggling, and murder-for-hire operations. . . .

"And the penalty? – up to life in prison, heavy fines, and the possibility that the government may seek forfeiture of assets. . . . At a minimum, the draconian penalties endorsed by the majority are unconstitutionally excessive." (App. A at 43-44).

Petitioners filed a motion for rehearing, which the court denied without opinion on December 19, 1990. (App. D at 92.)

REASONS FOR GRANTING THE WRIT

In *Roth v. United States*, 354 U.S. 476 (1957), this Court first held that "obscenity" could be criminalized, but emphasized that such laws should not truncate public discourse regarding sexuality:

"[S]ex and obscenity are not synonymous. . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protections of freedom of speech and press. Sex, a

> great and mysterious motive force in human life, has indisputedly been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." 354 U.S. at 487.

Today, American attitudes toward sexual issues and toward erotic materials have changed dramatically since the 1950's. The intervening experience with obscenity prosecutions has, meanwhile, proved an uneasy one at best, in terms of accommodating important First Amendment interests. The recent use and misuse of obscenity statutes threaten to dramatically curtail sexual candor in the media, and to deny the adult public access to materials regarding this quintessential area of human interest and concern.

Petitioners in this case raise two entirely independent yet interrelated claims. The first is that the Florida RICO statute under which they are being prosecuted, by prescribing a potential 30-year prison term for as few as two obscenity offenses, incalculably chills and censors much expression that is in fact *protected* under the First Amendment. The Florida courts have upheld the RICO Act with its unprecedented, chilling penalties because they have misread this Court's opinion in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), as indicating that the Constitution imposes *no limits* on the manner in which obscenity offenses may be punished, regardless of the effects upon *protected* speech. Although this Court apparently assumed in *Fort Wayne Books* that there is a level of punishment beyond which an obscenity law would create an unacceptable chilling effect, not only the Florida courts but others have misinterpreted some of the dicta in that decision to mean that the state and federal governments have free rein in punishing obscenity, without regard to the overbreadth and chilling effect of penalties like the threatened 30-year prison term challenged here. *See also United States v. Pryba*, 900 F.2d 763 (4th Cir. 1990).

The Ninth Circuit has held otherwise, in *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493-496 (1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades,*

Inc., 472 U.S. 491 (1985), and as reaffirmed in *Polykoff v. Collins*, 816 F.2d 1326, 1338-1339 (9th Cir. 1987). As a result, there is a conflict among the circuits which underscores the urgent need for this Court to clarify the relevance of the chilling effect doctrine in this area.

Secondly, Petitioners challenge the Florida obscenity statute on grounds that the *Miller* standard's unquestionable imprecision has presented an increasingly grave constitutional dilemma in light of social and legal changes over the past decade. With the Video Revolution, explicit erotic materials, particularly in the videocassette medium, have become a staple of the American home video marketplace, their overt consumption dramatically increasing the level of community tolerance for erotica everywhere. Americans now rent hundreds of millions of sexually explicit videotapes each year.[2] As a result, what the *Miller* Court thought would comprise a "bright-line" category of "hard-core pornography" now includes a significant percentage of videotapes available at most corner video stores, and which have become standard viewing fare for scores of millions of Americans in the privacy of their own homes.

Concomitantly, many of the concerns that underlay the *Miller* decision have been drastically eroded by these developments. The Video Revolution has transformed the nature of the marketplace, and the advent of "adult zoning" laws has more precisely addressed neighborhood problems created by former "red light" districts. In tandem with the effective use of these laws, the corner video store, manifesting none of the "secondary effects" associated with adult bookstores, has virtually decimated other markets for erotic materials, particularly the declining "red light" businesses. *See* Groskaufmanis, "What Films

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[2] In 1989, "X-rated tape rentals [amounted] to 395 million, constituting about 12% of all rentals." *Los Angeles Times Magazine*, February 17, 1991, at 11.

We May Watch: Videotape Distribution and the First Amendment," 136 U.Pa.L.Rev. 1263, 1284-86 (1988).[3]

In the face of the immense popularity of sexually explicit materials, in recent years government has declared war on sexual expression, regardless of its constitutional protection. Before the Meese Commission had issued it *Final Report*, a federal court was required to restrain its patently unconstitutional attempts to persuade retail store owners to curtail distribution of *Playboy* and *Penthouse*, by implying that carrying such materials could subject them to obscenity prosecutions. *See Playboy v. Meese*, 639 F.Supp. 581 (D.D.C. 1986). The legacy of the Meese Commission has been the Justice Department's Obscenity Unit, ideological censors whom the courts have twice restrained in their efforts to drive X-rated distributors out of business by means of multiple federal obscenity prosecutions designed to bankrupt and annihilate. *See Freedberg v. U.S. Justice Department*, 703 F.Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Department of Justice*, 743 F.Supp. 15, 18-19 (D.D.C. 1990). The Justice Department's obscenity unit has become "a high-voltage prosecution machine," as the *Wall Street Journal* reported recently, launching "the most aggressive federal attack on pornography in decades."[4]

Obscenity Unit Director Patrick Trueman has recently "credited his squad with reducing the size of the pornography business," and has promised to widen the nets to ensnare the local video store in federal obscenity prosecutions:

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[3] For example, Groskaufmanis notes that half of all adult movie theaters had closed, as of three years ago, *id.* at 1285 n. 160; *see also* Kristoff, "X-Rated Industry in a Slump," *New York Times*, October 5, 1986, § 3 at 1, col. 2, 6.

[4] "Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far From Their Home Bases," *Wall Street Journal*, July 27, 1990, at A 1.

> "To Trueman, whose squad has . . . helped put a half-dozen major producers and distributors . . . out of business, the neighborhood video store is the next likely target.
>
> " 'We'll prosecute the video store owner as well as the producer and distributor,' Trueman said. 'You'll see that . . . as we announce more and more indictments.' "[5]

Likewise in Florida, pro-censorship officials are aggressively prosecuting based on the recordings of 2 Live Crew, R-rated videotapes, even bathing suits and bumper stickers under this anti-"obscenity" statute.[6] To the knowledge of undersigned counsel, there have been at least half a dozen RICO/obscenity prosecutions based solely on mainstream X-rated videotapes in Florida, and many more which have been imminently threatened.

Because such censorial officials at all levels of government are currently exploiting the elasticity of the *Miller* test with its low scienter standard, and brandishing draconian penalties in a patently unconstitutional effort to purge America of *protected* erotic materials, there is a compelling need for this Court to interpose rules which will more effectively safeguard those materials from this unwarranted censorship.

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[5] "Man Of Prayer Leads U.S. Anti-Pornography Crusade," *Denver Post*, Sunday, November 4, 1990.

[6] *See* Anderson, "2 Live Crew Acquitted," 76 *ABA Journal* 29 (December 1990); Carter, "Judge, Lawyers Try To 'Rap' Up Ex-Rated Trial; The 2 Live Crew Case," *Los Angeles Daily Journal* (October 16, 1990), at p. 1, col. 2.

I.

THE THREAT OF A THIRTY-YEAR PRISON TERM FOR TWO OBSCENITY OFFENSES IS INTOLERABLY CHILLING OF FREE SPEECH, AND CENSORIAL OFFICIALS MUST BE DENIED SUCH WEAPONS FOR SUPPRESSING VAST NUMBERS OF PROTECTED WORKS.

The Florida RICO/obscenity statute, with its potential thirty-year prison term merely for two obscenity offenses, may be the most harshly punitive anti-obscenity law in the nation, but it is far from unique. Over the past few years, increasingly draconian punishments for obscenity have been enacted, including provisions for blanket forfeitures under state and federal RICO provisions,[7] massive forfeitures for obscenity offenses (18 U.S.C. § 1467), and extensive prison sentences, of which the Florida RICO Act's 30-year term is simply the most extreme example. In tandem with the amorphous obscenity definition and the lack of any real scienter requirement, these penalties make disseminating any sexually-explicit materials an ultrahazardous endeavor. Such death-dealing penalties allow officials hostile to erotic speech to effectively censor vast quantities of materials protected by the First Amendment without any judicial involvement whatsoever.

A.

The RICO Act's Speech-Chilling Penalties Render the Statute Overbroad and Facially Unconstitutional.

The chill currently brought to bear upon all presumptively protected erotica results from three factors: the elasticity of the obscenity definition, the lack of scienter required for obscenity offenses, and the severity of these

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[7] *See, e.g.*, 18 U.S.C. § 1963.

penalties. In raising this chilling effect argument, Petitioners are not simply seeking to relitigate the *Miller* standard, as the majority characterized and rejected a similar argument in *Fort Wayne Books*, 489 U.S. at 57. Rather, Petitioners here are challenging the potential 30-year prison term under the RICO Act as itself *overbroad*, because penalties of this magnitude raise the stakes so high that they indirectly censor much protected material by their chilling effect.

For the sake of this argument, then, Petitioners accept as given the *Miller* definition of obscenity and the *Hamling* rule regarding scienter, which in no way cures the former's imprecision. Holding those factors constant, it becomes apparent that the severity of punishment threatened is critical. As the trial court below noted, "It may be one thing to have a 'dim line' in a misdemeanor statute." (App. C at 82.) It is entirely another to attach penalties of this magnitude to a vague statute:

> "Because of the extraordinarily severe penalties for guessing wrong, few individuals will be willing to accept the extreme penalty for a wrong guess.
>
> "Thus the State has conceived an unreviewable prior restraint by virtue of the very existence of this statute . . . as applied to obscene materials." (App. C at 81.)

This Court recognized in *New York v. Ferber*, 458 U.S. 747, 773 (1982), that the degree of the punishment involved factors into overbreadth analysis: "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." *See also* Schauer, "Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect,' " 58 B.U.L.Rev. 685 (1978).

These severe RICO penalties create a relatively unique type of overbreadth. In the anomalous situation created by the ineluctably vague *Miller* standard, penalties this severe result in a statute which is overbroad in the same sense the Court described in *Secretary of State of*

Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 967-968 (1984):

> "Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack."

Or, as the Court noted in *Members of City Council of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 797-798 (1984), facial invalidation is required where, as here, statutes are "unconstitutional on their face because . . . any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas."

In *Fort Wayne Books*, this Court rejected a chilling effect challenge to the considerably lower penalties for violations of the Indiana RICO/obscenity statute. Those penalties were, as the Court noted, within a range previously upheld as acceptable for obscenity offenses, in *Smith v. United States*, 431 U.S. 291, 296 (1977), for example. 489 U.S. at 59 n. 8. The Court in *Fort Wayne Books* must have assumed that at some point, however, penalties for obscenity cross a threshold of unacceptable chilling effect, simply reserving as "unripe" the question of the much harsher civil RICO penalties also challenged there. *Id.* at 60 and 65 n. 11.

In *Fort Wayne Books*, this Court spoke of the legitimate "deterrence of the sale of *obscene* materials." *Id.* at 60 (emphasis added). The chilling effect of which Petitioners complain here, however, is the RICO Act's widespread deterrent effect on *protected* speech, not unprotected. In *Sable Communications, Inc. v. F.C.C.*, ___ U.S. ___, 109 S.Ct. 2829, 2836 (1989), this Court reaffirmed that "sexual expression which is indecent but not obscene is protected by the First Amendment." Such speech must be sheltered from the overbroad, indirect censorship effects of penalties like this 30-year prison term; as the Court long ago

insisted in *Smith v. California*, 361 U.S. 147, 152 (1959): "Our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene."

In *Smith v. California*, and *New York Times v. Sullivan*, 376 U.S. 254, 278-279 (1964), this Court originally developed the doctrine of chilling effect, condemning as unconstitutional laws which by virtue of insufficient scienter requirements and/or limitless penalties create a pall of self-censorship affecting protected expression. In *Smith*, decided shortly after *Roth*, this Court confronted the issue of self-censorship created by a statute imposing strict liability for possession of obscene materials. The Court concluded that to impose strict liability for unprotected speech would create a chilling effect and "work a substantial restriction on the freedom of speech and of the press." 361 U.S. at 150. The *Smith* Court articulated the essential problem posed by an obscenity statute lacking an adequate scienter requirement, or which fails to provide a concrete definition of the offense. Such a law, compelling speakers to act at their peril,

> "tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge . . . , he will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon . . . protected as well as obscene literature . . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to [materials] the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Id.* at 153-154.

Because of these special First Amendment concerns, booksellers could not be made "the strictest censors of

their merchandise," without unduly chilling protected expression. *Id.* at 152.

Building upon *Smith*, in *New York Times v. Sullivan* this Court held that the heightened scienter standard of "actual malice" was necessary in civil libel actions to prevent a widespread chilling effect. As in *Smith*, a contrary rule "compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship.' " 376 U.S. at 279. In the absence of such safeguards, "the pall of fear and timidity imposed . . . is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

Like the unlimited penalties threatened in *New York Times*, the threat of sanctions this severe merely for disseminating previously unlitigated erotic materials, even if under a reasonable belief that they were within community standards and thus protected, creates a pall of fear and an atmosphere antagonistic to First Amendment freedoms. Although this Court concluded in *Fort Wayne Books* that, with regard to the much lesser penalties Petitioner Sappenfield challenged there, the "mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents," this case obviously involves more than a "mere assertion." Here the chilling effect is patent, as the dissenting Florida Supreme Court Justices noted:

> "Even a brief consideration of the majority opinion discloses how, in the real world beyond this courtroom, the chilling effect will be very severe indeed. Under the majority opinion, the possession or sale of 'offensive' materials is equated with organized crime, drug smuggling, and murder-for-hire operations. . . .
>
> "And the penalty? – up to life in prison, heavy fines, and the possibility that the government may seek forfeiture of assets. . . . At a minimum, the draconian penalties endorsed by

the majority are unconstitutionally excessive." (App. A at 43-44).

B.

There Is A Conflict Among The Circuits On The Question Of Whether The First Amendment Limits The Magnitude Of Penalties Which May Be Imposed For Obscenity Offenses.

The fact that the federal Courts of Appeals are divided on this issue underscores the importance of this Court's addressing the question of whether overly severe penalties for obscenity may render the statute facially overbroad. The Ninth Circuit has struck down as unconstitutionally overbroad an anti-obscenity statute raising substantially the same question as the Florida RICO statute. In *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493-496 (1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the court invalidated a law which sought to punish a business which disseminated obscene materials as a "moral nuisance," just as the RICO statute defines a business which has twice the disseminated obscenity as a "racketeering enterprise." As punishment for the offense of maintaining a moral nuisance, the Washington statute at issue in *J-R Distributors* authorized unlimited civil fines, determined in part on the basis of "profits made by the defendant attributable to the moral nuisance." The court concluded this civil penalty provision was "an obviously unconstitutional feature" of the statute. 425 F.2d at 493. The *J-R Distributors* court held that because the statute's limitless penalties had undue consequences for constitutionally protected speech, it was impermissibly overbroad: "the civil fine provision endangers protected speech." *Id.* at 494.

Although this decision was denied precedential value by its reversal on procedural grounds, the Ninth Circuit reaffirmed its *J-R Distributors* analysis in *Polykoff v. Collins*, 816 F.2d 1326, 1338-1339 (9th Cir. 1987). In *Polykoff*, the plaintiffs challenged Arizona's high felony fines of up

to $1,000,000 for corporate obscenity violations on First Amendment grounds, including the chilling effect and overbreadth of such potentially bankrupting fines. The court agreed that confiscatory or bankrupting fines for obscenity, tantamount to RICO forfeiture, would create a prior restraint if they forced closure of the affected business, but concluded that Arizona's sentencing guidelines precluded this possibility. 816 F.2d at 1338-39. On this basis, the court also concluded that the appellants had failed to demonstrate that the fine provisions, properly understood as limited under the sentencing guidelines, would unduly chill protected speech. The court did acknowledge, however, that "certain criminal penalties might impermissibly chill the exercise of first amendment rights." *Id.* at 1340.

In contrast, the Fourth Circuit in *United States v. Pryba*, 900 F.2d 763 (4th Cir. 1990), *cert. den.* 111 S.Ct. 305 (1990), has indicated that there are no penalties for obscenity which would run afoul of the First Amendment. The *Pryba* court held that the federal RICO and obscenity statutes under which the defendants were convicted did not exert a chilling effect, regardless of the threat of blanket forfeiture, astronomical fines, and virtually limitless prison sentences. This dangerous doctrine results from a misreading of this Court's opinion in *Fort Wayne Books*, and creates a division among the circuits which requires this Court's immediate resolution.

II.

BECAUSE LEGAL AND SOCIAL CHANGES SINCE THIS COURT DECIDED *MILLER V. CALIFORNIA* HAVE ERODED ITS CENTRAL PREMISES, THE OBSCENITY STANDARD VIOLATES THE FIRST AMENDMENT AND DUE PROCESS, UNLESS THE COURT TEMPERS ITS VAGUENESS AND OVERBREADTH BY IMPOSING A MEANINGFUL SCIENTER REQUIREMENT.

The recent Mapplethorpe trial illustrates the degree to which the *Miller* test's unquestionable amorphousness

enables censorship-minded or publicity-hungry officials to bring obscenity charges against virtually any controversial, sexually-oriented materials. By bringing obscenity charges against the Cincinnati Contemporary Arts Center and its director, Dennis Barrie, local officials were in essence able to fine the museum $350,000, the cost of its legal defense, for exhibiting acclaimed photographic works a jury eventually determined to be protected by the First Amendment.[8] The first obscenity trial ever to target an art museum, this prosecution has sent a message to the artistic community that exercising First Amendment rights can be an expensive proposition.

Just as the controversial work of this renowned homosexual artist was singled out for prosecution, not in small part because Mapplethorpe had dared to depict black and white men embracing, the recordings of 2 Live Crew have been targeted for prosecution in Florida. Under this very obscenity statute, an all-white jury convicted record store owner Charles Freeman of obscenity last October, the first time in American history that a musical work had been found obscene.[9] With penalties ranging as high as blanket forfeiture and the Florida RICO statute's 30-year prison term for two obscenity offenses, the message to retailers is clear: Take anything controversial off the shelves; it's not worth it.

As these speech-chilling prosecutions bear witness, the *Miller* doctrine continues to cast an ominous shadow over *any* controversial sexual expression. They demonstrate the continuing relevance of the dissenting justices' remarks in the Florida Supreme Court decision below, after elaborating the many instances in which censorial

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[8] "Barrie and the [Contemporary Arts Center] did not profit from the controversy . . . . This act of conscience had a three-hundred-fifty-thousand-dollar price tag." Petersen, "Showdown in Cincinnati," *Playboy* (March 1991) 64, 66.

[9] "Art or Smut? Furor Stretches from Ohio to Florida," *Chicago Tribune* (October 4, 1990) 1, 2.

officials have targeted controversial works of art for obscenity prosecutions:

> "The attempts at censorship described in these cases reveal how difficult it is to determine what constitutes obscenity. They show that, too often, the label 'obscenity' has been used as little more than a buzz-word by which some partisan group has attempted to impose its views of life, art, or entertainment on others who do not share those views." (App. A at 29.)

A.

Subsequent Social and Legal Changes Have Steadily Eroded The Miller Court's Rationales For Criminalizing Obscenity.

Justice Brennan, who had authored the *Roth* opinion holding that obscenity could be criminalized, recanted and emphatically dissented in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973):

> "[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, . . . and . . . the asserted state interest in regulating the dissemination of . . . sexually-oriented materials."

The ensuing 18 years of additional experience with the obscenity doctrine have only intensified the constitutional dilemma. Dramatic cultural changes have undermined the justifications for criminalizing obscenity, as adult films previously available primarily in seedy "red light" districts have become standard viewing fare in American homes. Also since *Miller*, the Court has approved localities' use of zoning laws to protect neighborhoods from the deleterious "secondary effects" assertedly associated with some adult businesses. These social changes have substantially undermined the essential

premises of the *Roth/Miller* doctrine, and the Court itself has recently characterized the governmental interests in denying adults access to erotica as "weak" and "paternalistic." *Osborne v. Ohio*, ___ U.S. ___, 110 S.Ct. 1691, 1696-1697 and n. 4 (1990).

In the "flag burning" cases, *Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533 (1989), and *United States v. Eichman*, ___ U.S. ___, 110 S.Ct. 2404 (1990), the Court completely discredited the notion that "disagreeable" or "offensive" speech may be banned without a particularized determination that it will cause palpable harm. Also, recently in *Boos v. Barry*, 485 U S. 312, 321 (1988), a majority of the Court took the position that any regulation of speech justified with reference to "listeners' reactions" must withstand strict scrutiny as a content-based law, e.g, an ordinance "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies." All of these opinions indicate the demise of the "two-tiered" mode of analysis, under which the Court formerly discerned broad categories of speech which government could censor without demonstrating a compelling interest in doing so.

In *Paris Adult Theatre*, Chief Justice Burger undertook to explain for the first time *why* "obscenity" could be treated as an exception to First Amendment protection. For the scant majority, he invoked several "legitimate" state interests, all of which may be reduced to an argument that government may regulate a broad category of speech based on "unprovable assumptions about what is good for the people," 413 U.S. at 62, without any showing of a compelling interest.

In support of its first rationale, the Court cited the *Minority Report* of the 1970 Commission on Obscenity and Pornography for the proposition that "there is at least an arguable correlation between obscene material and crime," *id.* at 58, although the *Majority Report* of the 1970 Commission found no such correlation,[10] and the Court

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[10] *See Report of the Commission on Obscenity and Pornography* (1970) at 27.

itself had rejected this rationale in *Stanley v. Georgia*, 394 U.S. 557, 566 (1969), finding "little empirical basis" for the assertion "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." The Court just reiterated this latter point with approval in *Osborne v. Ohio*, 110 S.Ct. at 1696 and n. 4. In fact, most social scientists deny a link between nonviolent sexually-explicit material and anti-social behavior.[11] Even the Meese Commission concluded that the balance of social scientific evidence "is slightly against" the hypothesis that there is any correlation between nonviolent, non-degrading sexually-explicit materials and sexual violence. 1 Attorney General's Commission on Pornography, *Final Report* 337-38 (1986).

Especially since the "Video Revolution" has popularized adult videos, which are now commonplace in millions of American homes, sexually-explicit materials are commonly within the bounds of community tolerance or acceptance. In this context, obscenity prosecutions for dissemination of individual items bear no rational relationship to the asserted governmental interests, when many thousands of comparable items remain freely available as protected non-"obscene" expression. As Justice Stevens noted, concurring and dissenting in *Fort Wayne Books*, 489 U.S. at 80-81:

> "Whatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment. Elimination of a few obscene volumes or

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[11] For example, the *New York Times* recently reported the conclusions of leading sexuality researcher Dr. John Money, who along with other researchers has "found no evidence that pornography causes or fosters the development or expression of paraphilias [aberrant erotic tendencies]." *See* "Scientists Trace Aberrant Sexuality," *New York Times*, January 23, 1990, at B5, 8.

videotapes from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality."

Likewise, random, erratic obscenity prosecutions are not even reasonably related to an asserted interest in protecting "the total community environment, the tone of commerce in the great city centers," *Paris Adult Theatre*, 413 U.S. at 58, because they do not at all address the existence of the "red light" districts the Court apparently had in mind. The problems associated with such urban districts are properly addressed by more narrowly-tailored solutions such as zoning laws and similar regulations of "adult" businesses, which the Court subsequently approved in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and even more expansively in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). This rationale cannot, then, justify outright suppression of books and films on the basis of their "obscene" content: "to assert, as the Court has, that unmarked brown envelopes speeding through the mails to Mr. Stanley's protected home impinge on the 'total community' environment is surely to claim too much," as Professor Tribe has observed.[12] Because the truly important state interests in protecting minors and unwilling adults can be achieved more narrowly, blanket criminal bans on "obscenity" are overbroad and unconstitutional.

B.

The *Miller* Test For Obscenity Has Become Increasingly Vague With The Advent Of The Video Revolution, Necessitating This Court's Reassessment Of Its Constitutionality.

The majority in *Miller* believed that statutes adopting its guidelines would "provide fair notice to a dealer in such materials," because "no one will be subject to prosecution for the sale or exposure of obscene materials

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[12] Tribe, *American Constitutional Law* 917 (1988).

unless these materials depict or describe patently offensive 'hardcore' sexual conduct." 413 U.S. at 27. This supposedly "bright line" test has, however, become meaningless with the popularization of "hardcore" erotic videotapes, which apparently enjoy not only community tolerance but tremendous popularity throughout the country.

In *Miller*, moreover, the majority focused solely on the "fair notice" aspect of the vagueness doctrine, the rule that a statute is vague if it fails adequately to define the offense so as to provide reasonable notice of the prohibited conduct. More recently in *Kolender v. Lawson*, 461 U.S. 352 (1983), however, the Court treated as even more important the parallel requirement that a statute not inherently lend itself to arbitrary or erratic enforcement by police, prosecutors, and juries. In this post-*Miller* decision, the Court invalidated a statute requiring persons to provide "credible and reliable" identification.

> "We have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " 461 U.S. at 358.

The Court emphasized that its concern was based "upon the 'potential for arbitrarily suppressing First Amendment liberties.' " *Id.*, quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965).

Echoing Justice O'Connor's concerns in *Kolender*, Justice Rosemary Barkett, dissenting from the Florida Supreme Court's opinion below, observed that unlike any other offense, obscenity

> "depends, not on an objective definition obvious to all, but on the subjective definition first, of those who happen to be enforcing the law at the

time, and, second, of the particular jury or judges reviewing the case.

> "Such a procedure runs counter to every principle of notice and due process in our society. . . . It would be legally indefensible in any other criminal context to respond that a crime is whatever a handful of people define it to be *after* the fact." (App. A at 15-16.)

The Video Revolution has rendered the always-problematic *Miller* test virtually nonsensical. As current events demonstrate, *Miller*'s elasticity leaves officials hostile to sexual speech free to prosecute at will, and to exact a heavy toll even if the materials involved are ultimately deemed completely protected under the First Amendment. The worsening impositions upon free expression in this situation require this Court's careful reconsideration of the *Miller* doctrine.

C.

Because The *Miller* Standard Is Incurably Vague, A Meaningful Scienter Element Is Essential To Salvage Its Constitutionality.

This Court could cure the vagueness dilemma inherent in the obscenity offense by requiring meaningful proof of scienter as an element of the obscenity offense. As the Court noted in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982), "a scienter requirement may mitigate the law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

In its prior decisions, however, the Court has not insisted that the obscenity offense include a meaningful scienter component, requiring only that the speaker have "knowledge of the contents[,] character and nature of the materials," not of their legal status as obscenity. *Hamling v. United States*, 418 U.S. 87, 123 (1974). Thus the Florida obscenity statute defines the offense as requiring that the state prove scienter merely

> "by showing facts and circumstances from which it may fairly be inferred that he had such knowledge [of the contents or character of the material], or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character." § 847.011(6).[13]

In practice, this standard amounts to strict liability, which as noted above this Court has condemned in *Smith v. California*, and *New York Times v. Sullivan* as creating a pall of self-censorship.

Given the vaguely defined obscenity standard, this lack of a meaningful scienter element casts a tremendous pall over the entire field of sexually oriented speech. Under the present scienter test, a disseminator may be convicted on a showing merely of knowledge of sexual content and character, i.e. that the material dealt with sex and not golf or horticulture. Given the degree to which contemporary society has enthusiastically embraced sexually explicit materials, however, such a scienter standard is tantamount to no standard at all in terms of distinguishing prosecutable, culpable conduct from the dissemination of constitutionally protected material. The new arsenals of "virtually unlimited" punishments with which prosecutors are now armed have engendered an ever more intolerable regime of self-censorship.

Under *Smith v. California* and *New York Times*, whenever government seeks to sanction unprotected speech, the First Amendment has been held in every other context to require some proof that the speaker knew the speech was of an unprotected nature. Even under the

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[13] *See also Sherwin v. United States*, 572 F.2d 196 (9th Cir. 1978) (obscenity conviction upheld on mere knowledge of material's "sexual orientation"); *Sewell v. Georgia*, 238 Ga. 495, 233 S.E.2d 187 (1978), *appeal dismissed*, 435 U.S. 982 (1978) ("constructive knowledge" of material's contents sufficient for obscenity conviction).

federal child pornography statute, the Ninth Circuit recently held in *United States v. United States District Court*, 858 F.2d 534, 539 (9th Cir. 1988), that a defendant could not be convicted on a strict liability basis because "a speaker may not be put at complete peril in distinguishing between protected and unprotected speech," with the unconstitutional result of self-censorship. Even in the area of child pornography regulation, which involves more compelling interests and lesser First Amendment concerns than are at issue in this case, the Ninth Circuit held that a defendant must be allowed to introduce evidence of a reasonable, good faith belief that the performer depicted was of legal age. Likewise, allowing obscenity defendants to show that they had a reasonable belief that allegedly obscene materials were within community standards would go far toward mitigating the chilling effect the amorphous *Miller* standard causes.

It is not as if the state and federal governments were compelled to foster this regime of self-censorship or else give up their ostensible purpose of preventing the circulation of "obscene" materials. There are numerous alternative means of enforcing the "obscenity" prohibition, even assuming its overall constitutional validity. *Paris Adult Theatre*, for example, involved a civil procedure whereby the state sought an injunction to prohibit the showing of particular films judicially determined to be obscene. Justice Douglas, dissenting in *Miller*, 413 U.S. at 41, argued that this type of procedure should be the minimum requirement if indeed obscenity were to be criminalized: "Until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained," because of the lack of fair notice to the speaker otherwise.

Justice Brennan took up this idea in *McKinney v. Alabama*, 424 U.S. 669, 679 (1976), noting that if obscenity must be criminalized, such civil procedures provide the "best possible notice, prior to any criminal indictments, as to whether the materials are unprotected." Given proper procedural safeguards, such advance warning

would greatly alleviate the pressure to self-censor. Such civil adjudications would surgically excise obscene material in any jurisdiction, while leaving protected erotica alone and tempering the obscenity laws' chilling effect.

Requiring some sort of fair notice is far from impractical. Indeed, in a series of prosecutions for non-registration for the draft, a context involving no scienter problem whatsoever and relatively minor First Amendment concerns, the Justice Department pursued a "beg policy" whereby it issued repeated direct warnings to individuals known to have willfully avoided draft registration. Some of those ultimately prosecuted asserted a selective prosecution defense on grounds that they were singled out for political reasons as known draft resisters. The issue reached this Court in *Wayte v. United States*, 470 U.S. 598 (1985), and the Court stressed the "beg policy" as demonstrating the government's good faith, concluding "that the Government's passive enforcement system together with its 'beg' policy violated neither the First nor Fifth Amendment." 470 U.S. at 614.

Similarly, the state could easily alert distributors of erotica, like these defendants, that it perceives certain of their wares to be beyond community standards. The distributors could then pursue various alternatives, such as negotiations with the state's attorneys, declaratory litigation, or voluntary curtailment of their distribution activities. The lack of such procedures to provide any kind of fair notice whatsoever, much less to provide a bloodless civil determination of obscenity, leaves the obscenity laws unconstitutionally vague in violation of the First and Fourteenth Amendments.

D.

The *Miller* Doctrine Should Be Revisited Because It Has Fallen Into Grave Disrepute.

The *Miller/Paris Adult Theatre* doctrine has increasingly fallen into disrepute, not only among scholars but also among prominent jurists, in addition to the

numerous members of this Court who have frankly disdained this doctrine. As Justice Stevens noted in *Fort Wayne Books*, 489 U.S. at 71-72 n. 1, even the Meese Commission in its *Final Report* acknowledged that the consensus of scholarly opinion has supported the dissenters:

> "In light of the facts that the Supreme Court did not in *Roth* or since unanimously conclude that obscenity is outside of the coverage of the First Amendment, and that its 1973 rulings were all decided by a scant 5-4 majority on this issue, there is no doubt that the issue was debatable within the Supreme Court, and thus could hardly be without difficulty. Moreover, we recognize that the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues is incorrect. 1 Attorney General's Commission on Pornography, *Final Report*, 260-261 (July 1986)."

The Supreme Courts of Hawaii and Oregon have also recently rejected the *Miller* approach, both of them *unanimously* striking down their states' criminal obscenity laws state constitutional grounds. In *State v. Henry*, 302 Or. 510, 732 P.2d 9, 17 (1987), the Oregon Supreme Court unanimously agreed with Justice Brennan "that the *Roth/Miller /Paris Adult Theatre* approach is incompatible with a coherent theory of free expression under the First Amendment." Similarly in *State v. Kam*, 69 Haw. 483, 748 P.2d 372, 379 (1988), the Hawaii Supreme Court embraced "the eloquent reasoning in *Stanley [v. Georgia]*," concluding that the state had no compelling interest in criminalizing obscenity. Both of these courts agreed that although more narrowly drawn regulations would be appropriate, criminal sanctions for disseminating erotica to consenting adults are unconstitutional:

> "We do not hold that this form of expression, like others, may not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is

> before us. But it may not be punished in the interest of a uniform vision of how human sexuality should be regarded or portrayed." *State v. Henry*, 732 P.2d at 18; *see also State v. Kam*, 748 P.2d at 380 n. 2.

Nor has the *Miller* doctrine ever won the hearts and minds of more than a bare majority of this Court. In *Pope v. Illinois*, 481 U.S. 497 (1987), for example, in addition to the dissents of Justices Stevens, Brennan, and Marshall, Justice Scalia noted that it was "impossible to come to an objective assessment of (at least) literary or artistic value." 481 U.S. at 504. "All of today's opinions," he concluded, "display the need for reexamination of *Miller*." *Id.* at 505.

In *Fort Wayne Books*, 489 U.S. at 57, the majority construed Petitioner Sappenfield's chilling effect challenge to Indiana's lesser criminal RICO penalties as "nothing less than an invitation to overturn *Miller* – an invitation that we reject." Yet the *Fort Wayne Books* petitioners did not seek to litigate the continuing validity of the *Miller* standard. They urged only that the "inherent vagueness" of that standard must be considered as part of the calculus of chilling effect when the state adds crushing penalties to that calculus, as Petitioners here have argued in challenging the Florida RICO Act's 30-year prison term. Unlike the parties in *Fort Wayne Books*, however, Petitioners in this case have squarely presented the issue of the *Miller* doctrine's viability from the beginning of this case.

Because *all* of the stated and implicit justifications for the blanket criminalization of "obscenity" have been drastically undermined, that doctrine must be re-examined. Government's present use of *Miller*-based statutes exert too great a toll on sexually oriented expression specifically, and on First Amendment doctrine generally, to be retained.

III.

BECAUSE THE CHALLENGED CRIMINAL RICO PENALTIES AND THE *MILLER* DOCTRINE ARE CURRENTLY BEING EXPLOITED TO EFFECT WIDESPREAD CENSORSHIP OF PROTECTED MATERIALS, THIS CASE PRESENTS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH IS RIPE FOR RESOLUTION BY THIS COURT.

In *Fort Wayne Books*, this Court deemed certain of the petitioners' challenges nonjusticiable, because the penalties had not yet been imposed. Yet in *United States v. Pryba*, 900 F.2d 763 (4th Cir. 1990), *cert. den.* 111 S.Ct. 305 (1990), this Court denied review to obscenity defendants who had been stripped of their entire First Amendment business under the federal RICO Act. Solely for the sale and rental of five videotapes and six magazines found to be "obscene," the government confiscated the defendants' entire chain of twelve bookstores and video stores, which had stocked inventories of general audience video tapes as well as sexually-oriented "adult" videos. The trial court sentenced the principal defendant to serve a three-year prison term and imposed fines totalling almost half a million dollars. The Court of Appeals reasoned that because "obscenity" is unprotected speech, the First Amendment had no relevance and in no way limited these criminal penalties, regardless of their effect upon protected speech. Such a precedent is as dangerous to First Amendment freedoms as it is intellectually flawed. Petitioners respectfully submit that this issue of the limits which the First Amendment places on "punishment" for obscenity offenses cannot remain unaddressed without incalculable damage to the security of First Amendment rights in this nation.

As discussed above, standing and ripeness objections are not appropriate here, because Petitioners invoke the chilling effect these penalties are presently exerting over the protected First Amendment activities of others not before the Court. As in any situation involving statutory overbreadth, those who simply withdraw erotic materials from their

shelves under the threat of these and similar statutes will never find their way to this Court.

The current state of the law has resulted in a climate in which officials feel free to remove protected erotic materials from circulation by threats and coercion under these draconian statutes. At stake here are the continuing viability of the chilling effect and prior restraint doctrines enunciated in this Court's landmark decisions in *New York Times v. Sullivan* and *Near v. Minnesota*, 283 U.S. 697 (1931). For if there are no limitations on the "punishments" which can be imposed for obscenity offenses then the chilling effect doctrine has become a nullity.

Historically, this country has seen an abiding tension between constitutional protections of free expression and governmental attempts to suppress expression it disfavors. This Court is more than a neutral umpire in this contest – it has an obligation to ensure that expression is protected. Because the government's ability to induce self-censorship must be curtailed if those First Amendment protections are not to lose all meaning, Petitioners respectfully urge this Court to restore these essential doctrines to their former state of robust vitality.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge this Court to grant a writ of certiorari.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1990

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA, AND CMH ENTERPRISES, INC.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Florida

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

Nos. 74,020 & 74,390

TOMMIE LYNN STALL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

TODD EDWARD LONG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

[October 11, 1990]

McDONALD, J.

We have for review *State v. Long*, 544 So.2d 219 (Fla. 2d DCA 1989), which expressly declared constitutional section 847.011, Florida Statutes (1985 & Supp. 1986). We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and approve the district court's decision.

The state charged Stall, Long, and several other persons with violating the Florida Racketeer Influenced and Corrupt Organization (RICO) Act, section 895.01-.06, Florida Statutes (1985), predicated on forty-eight alleged violations of Florida's obscenity statute, section 847.011,

Florida Statutes (1985),[1] and the amended version of the statute that took effect in 1986.[2] The state also charged

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[1] The 1985 statute provided, in pertinent part:

> (1)(a) A person who knowingly sells . . . [or] shows . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording . . . is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083 . . . .
>
> (b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is presumptive evidence of the violation of said paragraph.
>
> (2) A person who knowingly has in his possession, custody, or control any obscene [material] . . . , without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor of the second degree. . . .

§ 847.011, Fla. Stat. (1985).

[2] The 1986 statute provides, in part:

> (1)(a) Any person who knowingly sells, . . . [or] shows . . . any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording . . . is guilty of a misdemeanor of the first degree. . . .

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each defendant individually with one or more counts of violating section 847.011. The violations allegedly occurred through the showing, sale, distribution, and rental of allegedly obscene writings and tapes, and objects allegedly intended for obscene purposes, between September 12, 1985 and March 7, 1987. Acting upon the petitioners' pretrial motion, the trial court dismissed the information and declared section 847.011 unconstitutional. The trial court held that, among other things, the statute violated Florida's privacy amendment, article I, section 23 of the Florida Constitution.[3] *State v. Long*, 544 So.2d at 220. The second district reversed, concluding

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(b) The knowing possession by any person of three or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is prima facie evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene [material] . . . , without intent to sell, lend, transmute, or advertise the same, is guilty of a misdemeanor of the second degree. . . .

§ 847.011, Fla. Stat. (Supp. 1986).

[3] Art. I, § 23, Fla. Const., provides:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

"that the protection afforded by the Florida right to privacy provision does not shield the appellees from criminal prosecution." *Id.* at 222. Assuming that the petitioners have vicarious standing to raise their customers' privacy interest, *id.* at 221-222, we agree with the district court that their customers' right of privacy does not extend to the petitioners.

If an obscenity statute is constitutional, RICO convictions based on that statute can be upheld. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916 (1989). This Court has consistently found section 847.011 to be constitutional. *Johnson v. State*, 351 So.2d 10 (Fla. 1977), upheld a conviction for selling obscene magazines and reaffirmed the principles that obscenity is not protected by the first and fourteenth amendments and that it is subject to regulation under the police power of the states. In *Sardiello v. State*, 394 So.2d 1016 (Fla. 1981), we again upheld the statute where the defendants had been charged with possession of obscene material with intent to sell. Moreover, we addressed the issue presented in the instant case in *State v. Kraham*, 360 So.2d 393 (Fla. 1978), *appeal dismissed*, 440 U.S. 941 (1979).

The state charged Kraham with selling obscene motion pictures. The trial court dismissed the charges, relying on *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that the state's power to regulate obscenity "does not extend to mere possession by the individual in the privacy of his own home." *Id.* at 568. From that holding the trial court reasoned: "A regulation that criminally punishes one for providing that citizen with material he

has a Constitutional right to possess is illogical and arbitrary." *Kraham*, 360 So.2d at 394. We reversed based on *Johnson*.

Stanley protects an individual's private possession of obscene materials, and our research discloses no Florida cases where the state prosecuted individuals merely for possessing obscene materials for their private use.[4] This is not to say, however, that our privacy amendment was meant to protect those persons who deal commercially in obscenity. The United States Supreme Court has never extended *Stanley* to sellers and distributors of obscene materials. Rather, that Court has consistently held that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws." *Fort Wayne Books*, 109 S.Ct. at 925.

Miller v. California, 413 U.S. 15 (1973), sets the standards for state regulation of obscene material. First, "the permissible scope of such regulation" is confined "to works which depict or describe sexual conduct." *Id.* at 24. Then, the basic guidelines are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a

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[4] To the extent that § 847.011(2), Fla. Stat. (1985 & Supp. 1986), criminalizes mere possession for private, individual use, that subsection is unconstitutional. That claim, however, is not presented in the instant case.

> whole, lacks serious literary, artistic, political or scientific value.

Id. (Citations omitted.)

Subsection 847.001(7), Florida Statutes (Supp. 1986), incorporates these standards:

> (7) "Obscene" means the status of material which:
>
> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Subsection 847.001(11) defines sexual conduct:

> (11) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

The 1985 statute contained a similar standard:

> For the purpose of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

§ 847.011(11), Fla. Stat. (1985). Although the 1986 statute refers only to "obscene" material and then defines that term, the 1985 statute contained the term "obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic" material. § 847.011(1)(a) (1985). Those words, however, constitute a term of art. As stated by Justice Harlan almost thirty years ago:

> The words . . . "obscene, lewd, lascivious, indecent, filthy or vile," connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of United States v. Bennett, 24 Fed.Cas. p. 1093, No. 14571, put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in Roth v. United States, supra, 354 U.S. at 489, 77 S.Ct. at 1311, "taken as a whole appeals to prurient interest."

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482-84 (1962) (emphasis in original, footnotes omitted). The Court recently recognized the continued validity of Justice Harlan's words in *Osborne v. Ohio*, 110 S.Ct. 1691 (1990). The statutes at issue are sufficiently limited, both by their terms and by common sense, to pass constitutional scrutiny.

Osborne also cautions that *Stanley* is not to be read too broadly. The United States Supreme Court has never done so and has specifically refused to extend *Stanley* to the sale and distribution of obscene material. *E.g., Osborne;*

Fort Wayne Books; Miller; Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973). Indeed, that Court has specifically stated "that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." *12 200-Foot Reels*, 413 U.S. at 128.

The petitioners claim, however, that we should construe Florida's privacy amendment to protect sellers and distributors of obscene material because, without such extension, an individual's right to possess such material is meaningless. The privacy amendment states, in part, that each "person has the right to be let alone and free from governmental intrusion into his private life." Art. I, § 23, Fla. Const. We first considered this amendment in *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985), and held that in assessing governmental intrusion into an individual's privacy rights the state must demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.* at 547. Be that as it may, we need not determine whether the obscenity statute embodies a compelling state interest because the privacy amendment does not apply to vendors of obscene material.

Before the right of privacy attaches "a reasonable expectation of privacy must exist." *Winfield*, 477 So.2d at 547. Determining "whether an *individual* has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective

manifestations of that expectation." *Shaktman v. State*, 553 So.2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring, emphasis added). Although one may possess obscene material in one's home, there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing such material. Also, it does not appear that the defense in the instant case presented private individuals whose right to possess obscene materials at home had been violated by the instant state action.

The state has a legitimate interest "in stemming the tide of commercialized obscenity." *Paris Adult Theatre I*, 413 U.S. at 57. To that end, even though a connection between obscene material and antisocial behavior is not proved, a legislature can determine such a connection exists and act on it to protect "the social interest in order and morality." *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Moreover, even if a legislative enactment "reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, [that] is not a sufficient reason to find that statute unconstitutional." *Paris Adult Theatre I*, 413 U.S. at 62.[5]

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[5] The Court went on to explain:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a

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In *Paris Adult Theatre I*, as in the instant case, the petitioners claimed that "state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers." *Id.* at 65. The Court answered by stating:

> Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of Stanley v. Georgia and the marital bedroom of Griswold v. Connecticut. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes . . . .
>
> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept or ordered liberty.'" This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

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State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

> If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive.

Id. at 65-67 (citations omitted). Regulating commerce in obscenity falls within the state's "power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole." *Id.* at 69.

> Practically any law interferes in some manner with someone's right of privacy. The difficulty lies in deciding the proper balance between this right and the legitimate interest of the state. As the representative of the people, the legislature is charged with the responsibility of deciding where to draw the line. Only when that decision clearly transgresses private rights should the courts interfere.

In re T.W., 551 So.2d 1186, 1204 (Fla. 1989) (Grimes, J., concurring in part, dissenting in part).

We are a society of individuals who make a whole community. As quoted by the United States Supreme Court:

> " . . . A man may be entitled to read an obscene book in his room, or expose himself indecently there. . . . We should protect his privacy. But if

> he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places – discreet, if you will, but accessible to all – with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not."

Paris Adult Theatre I, 413 U.S. at 59 (quoting 22 The Public Interest 25-26 (Winter 1971), footnote omitted, emphasis added in *Paris Adult Theatre I*).

The right to possess privately does not equate to the right to sell publicly. In the opinion under review Judge Schoonover correctly stated:

> It is clear that Florida's right to privacy is broader than the federal right. However, it is not so broad that a person can take it with him to the store in order to purchase obscene material – even though he has the right to possess such material in the privacy of his home.

Long, 544 So.2d at 223 (citation omitted). The privacy amendment "was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Florida Board of Bar Examiners re Applicant*, 443 So.2d 71, 74 (Fla. 1983).

There is no indication that the drafters of article I, section 23 meant to broaden the right of privacy as it relates to obscene materials or that the validity of section 847.011 is affected by the privacy provision.[6] Indeed, had

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[6] Except as stated in n. 4, *supra*.

the public been aware of such an application, we seriously doubt that the amendment would have been adopted.

In all due respect to our sister court in Hawaii, its decision in *State v. Kam*, 69 Haw. 483, 748 P.2d 372 (1988), erroneously rationalized that, because *Eisenstadt v. Baird*, 405 U.S. 438 (1972), allowed a vendor of contraceptives to raise purchasers' fourteenth amendment claims, a seller of obscene materials can claim and have the same rights as a private citizen to view such materials. *Eisenstadt* invalidated a Massachusetts statute controlling the sale of condoms because treating in a dissimilar manner similarly situated married and unmarried persons violated the equal protectior clause.[7] Before studying the statute

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[7] As a predicate for its ruling the Court quoted from *Reed v. Reed*, 404 U.S. 71, 75-76 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)."

Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972) (citations omitted).

the Court found no valid reason for the statute and rejected the contentions that (1) "the law's 'plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women' " *id.* at 448 (quoting *Commonwealth v. Allison*, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917)), or (2) "to serve the health needs of the community by regulating the distribution of potentially harmful articles," *id.*, because the statute was, in reality, merely an attempt to regulate morals, not a health measure. The Court made it clear, however, that it based its decision on equal protection grounds because the statute put users of contraceptives on unequal grounds. There is no such distinction between adults who may have access to obscene materials. Moreover, private users and commercial sellers are separate and distinct classes and may be treated differently.

Eisenstadt provides a vehicle, as do other cases, to raise the constitutionality of a statute by holding that persons or entities in different positions have the same rights and must be treated the same. It certainly does not sustain the rationale that, because one has a right to view obscene material is one's home, statutes forbidding the sale and commercial distribution of such material are invalid.

The statutes under review are constitutional; the decision under review is approved.

It is so ordered.

SHAW, C.J., and OVERTON, EHRLICH and GRIMES, JJ., concur.

BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.

KOGAN, J., dissents with an opinion, in which BARKETT, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BARKETT, J., dissenting.

As repugnant as I personally may find some "obscene" materials to be, I cannot vote to suspend the application of constitutional principles to achieve a desired result. The constitution requires criminal laws to unambiguously define the elements of a crime. A basic legal problem with the criminalization of obscenity is that it cannot be defined. Justice Stewart's assertion that "I know it when I see it" has become a household phrase. Yet, I daresay many households would differ with him and with each other about what is obscene. Thus, *this* crime, unlike all other crimes, depends, not on an objective definition obvious to all, but on the subjective definition, first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case.*

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* Thus, some "obscenity" is prosecuted and much equally "obscene" material continues to flood the marketplace. In addition to the legal infirmities, one must acknowledge that this approach has never worked. The law's haphazard enforcement has consumed court time (ironically often to a packed house) in the search for "community standards," sometimes resulting in the condemnation of commonly accepted works of art. *See infra* at 29-30 (Kogan, J., dissenting). Meanwhile, much truly degrading material continues to proliferate without censure.

Such a procedure runs counter to every principle of notice and due process in our society. The flaw in upholding laws criminalizing "obscenity" is most clearly exposed in attempting to answer the simple question posed by a student: "Who decides what is obscene?" It would be legally indefensible in any other criminal context to respond that a crime is whatever a handful of people define it to be *after* the fact.

Finally, once you concede, as you must, that Florida protects an individual's right to be free from unwarranted governmental intrusion, you cannot recede from that view simply because you find the activities people choose to engage in personally distasteful. Speculation and "unprovable" and "imponderable aesthetic assumptions" may justify personal decisions, but, contrary to the majority's position, they do not provide a constitutional basis to regulate the private conduct of others.

In this case, we are once again faced with the collision between legal principles and personal views of morality. I believe that a dispassionate and rational examination of the principles involved compels the conclusion that the statutes in question do not survive constitutional scrutiny. Accordingly, I concur with Justice Kogan's scholarly, complete, and correct legal analysis on this issue.

KOGAN, J., concurs.

KOGAN, J., dissenting.

In November 1980 the voters of Florida approved a constitutional amendment that was added to the state's Declaration of Rights. The privacy amendment provides:

> Right of Privacy. – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const.[8] Some eleven years before the adoption of this amendment, the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969), *limited on other grounds, Osborne v. Ohio*, 110 S.Ct. 1691 (1990), stated:

> For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> . . . .
>
> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. . . . [A] state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

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[8] This amendment followed a line of earlier case law recognizing a right of privacy in Florida. *Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978), *approved*, 379 So.2d 359 (Fla. 1980); *Graham v. Florida Legislative Investigation Committee*, 126 So.2d 133, 136 (Fla. 1960); *Thompson v. City of Jacksonville*, 130 So.2d 105, 108 (Fla. 1st DCA 1961), *cert. denied*, 147 So.2d 530 (Fla. 1962); *Griffith v. State*, 111 So.2d 282, 289 (Fla. 1st DCA 1959), *cert. denied*, 114 So.2d 6 (Fla. 1959). *See Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944) (recognizing tort of invasion of privacy as an aspect of right of privacy).

We ourselves acknowledged this holding as law in *State v. Keaton*, 371 So.2d 86, 91 (Fla. 1979).

Thus, at the time the privacy amendment was added to the Constitution, both the federal and Florida courts clearly had recognized a right of individuals to possess allegedly obscene materials in the home.[9] Accordingly, Florida constitutional law effectively has incorporated the privacy rights outlined in *Stanley*. *See Keaton*, 371 So.2d at 91-92. As we have noted, a "constitutional amendment must be viewed in light of the historical development of the decisional law *extant at the time of its adoption*. . . ." *Jenkins v. State*, 385 So.2d 1356, 1357 (Fla. 1980) (emphasis added). *Accord In re T.W.*, 551 So.2d 1186, 1197 (Fla. 1989) (Ehrlich, C.J., specially concurring) (privacy amendment incorporated federal privacy law as it existed in 1980).

I believe the right recognized by this Court in *Keaton* necessarily must include a right of discreet access to entertainment, writings, and other such material if the state cannot show that those materials are actually harmful to specific persons or that they intrude upon the rights of others.

It now is well established that the privacy rights created by Florida law are far broader than their federal counterparts. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 Fla. St. U.L. Rev. 671, 740 (1978) (detailing history). The state privacy amendment "embraces

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[9] However, the federal courts had never addressed the question of whether possession of child pornography in the home was permissible, until the case of *Osborne v. Ohio*, 110 S.Ct. 1691 (1990).

more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *T.W.*, 551 So.2d at 1192. *Accord Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 548 (Fla. 1985) (Florida privacy right is "much broader in scope than that of the Federal Constitution"). As a result, the federal case law prior to 1981 is persuasive only in that it identifies a *portion* of the interests protected by Florida's right of privacy.

This is a conclusion rooted as much in logic as in law. Unlike the situation in Florida, the federal right of privacy is an *implied* right arising not from any written source, but from the penumbras or "shadows" of the Constitution. Nowhere in the entire text of the federal Constitution does the word "privacy" appear. *Roe v. Wade*, 410 U.S. 113, 152 (1973), *limited on other grounds, Webster v. Reproductive Health Servs.*, 109 S.Ct. 3040 (1989). In some of its opinions the United States Supreme Court has even suggested that the federal right of privacy may encompass only such concerns as "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973). Elsewhere, the United States Supreme Court has gone to pains to distinguish the limited federal right of privacy from the more comprehensive right that can be provided by state constitutions. In *Katz v. United States*, 389 U.S. 347, 350-51 (1967), the Court stated:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have

> nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general right to privacy – his right to be let alone* by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States.

(Footnotes omitted) (emphasis added).

In contrast to the limited federal right of privacy, Florida law guarantees exactly the kind of general right of privacy mentioned in *Katz*. As Judge Gerald B. Cope, Jr.,[10] has noted in his scholarly analysis, the history behind the privacy amendment reveals that it was developed and proposed "in direct response to the United States Supreme Court's challenge . . . in *Katz*," quoted above. Cope, *supra*, at 740.

The broad scope established in the line of cases exemplified by *Winfield* and *T.W.* is only underscored by the choice of language in the privacy amendment itself. Professor Patricia Dore has noted that the members of the 1977-78 Constitution Revision Commission,[11] which

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[10] Judge Cope now serves on the Third District Court of Appeal.

[11] The Constitution Revision Commission actually proposed the present language of the privacy amendment in 1978 as part of an omnibus revision of the state Constitution presented to the voters and later defeated. However, the privacy amendment itself was severed from the omnibus package and presented as a separate proposal, winning approval in November 1980. Accordingly, we previously have resorted to the history of the 1977-78 Constitution Revision Commission,

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drafted the amendment with legal assistance from Dore, deliberately chose the phrase "right to be let alone" as a means of distinguishing Florida's broad privacy right from the limited federal right. Dore, *Of Rights Lost and Gained*, 6 Fla. St. U.L. Rev. 609, 652-53 n.268 (1978). This choice was based on the fact that *Katz* itself expressly had distinguished the state-created general "right to be let alone" from the federal "right of privacy."

The choice of phraseology is significant in one other respect. With it, the framers of the privacy amendment firmly planted their work in the mainstream of a long-standing discourse about the relation of individuals and their governments.

I. History of the "Right to Be Let Alone"

The phrase "right to be let alone" did not itself originate in the Revision Commission proposal, but echoes throughout more than a century of intensive legal scholarship and opinion-writing both in Florida and the nation as a whole. First appearing in Judge Cooley's treatise on *The Law of Torts* 29 (1st ed. 1880), the concept of a right to be let alone soon thereafter was extensively elaborated in a classic law review article by two noted jurists. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L.

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which Professor Dore and Judge Cope have extensively analyzed, to determine the intent underlying the privacy amendment. *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So.2d 533, 536 (Fla. 1987) (directly relying on Revision Commission history).

Rev. 193 (1890). It was to this 1890 law review article that the *Katz* Court cited. *Katz*, 389 U.S. at 350 n.6.

In the early years of its formulation, the "right to be let alone" generally was conceived as a private-law tort concept – the right to be free from unwanted interference by other individuals. *See* Warren & Brandeis, *supra*. Thus, the concept of privacy was first developed to confront the problem we now characterize as the tort of "invasion of privacy." This Court adopted this tort as a part of the common law or Florida in 1944, in the famous case involving an alleged invasion of privacy by Marjorie Kinnan Rawlings' book *Cross Creek*; and at that time we explicitly said that this tort was meant to protect the "right of privacy." *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944).

However, in the intervening century since the Warren and Brandeis article was written, the concept of a "right to be let alone" has expanded beyond its initial private-law formulation and now has given rise to a separate concept that imposes definite limits on *governmental* action.[12] The development of this public-law concept of privacy parallels the development in this century of new technologies and governmental techniques that have had grave potential to erode personal privacy.

The formulation of privacy as a public-law concept dates roughly from 1928, at a time when totalitarian

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[12] Indeed, the privacy amendment itself explicitly is concerned at least in part with a right to be "free from governmental intrusion into [one's] private life." Art. I, § 23, Fla. Const.

governments were rising in Europe and Asia. In that year one of the authors of the 1890 article on *The Right to Privacy*, Justice Louis Brandeis, first gave the phrase "right to be let alone" what has since become its distinctive public-law cast in one of the most famous and oft-quoted[13] dissents in American legal history:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone* – the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added). In construing the scope of Florida's "right to be let alone," we previously have looked to this formulation. *T.W.*, 551 So.2d at 1191 (relying upon *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)). *See* Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 Nova L.

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[13] Although the federal courts have never developed a privacy concept as vigorous as that urged by Justice Brandeis, they nevertheless have enthusiastically cited his *Olmstead* dissent to support a right of privacy in specific contexts. *E.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to have obscene materials in the home); *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (right to obtain contraceptives), *limited on other grounds*, *City of Dallas v. Stanglin*, 109 S.Ct. 1591 (1989).

Rev. 693, 827 n. 674 (1990) (discussing importance of the *Olmstead* dissent in Florida law).

As Justice Brandeis' statement suggests, the public-law concept of a "right to be let alone" addresses the same concerns as the private-law tort of invasion of privacy, from which it emerged[14]; but it also has expanded to include other problems uniquely associated with state action and the related erosion of privacy in this century. As Prosser and Keeton have noted,

> The "zone of privacy," so to speak, that is now safeguarded by the Constitution when state action is involved has been enlarged in recent years. It embraces not only the interests protected by the common law action [for invasion of privacy, . . . but it also protects to a considerable extent the *autonomy of the individual to make certain important decisions of a very personal nature.*

W. Prosser & W. Keeton, *The Law of Torts* § 117, at 866 (5th ed. 1984) (emphasis added).

Other legal scholars analyzing Florida's right to be let alone are in accord. One of the first scholars to study Florida's privacy amendment, Judge Cope, noted in 1978 that

> [m]odern conditions demand reexamination of the relationship between the individual and his government. If a free society is to remain free,

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[14] Indeed, historians have established that Brandeis heavily relied on his 1890 law review article in developing the public-law concept of privacy contained in this famous dissent. L.J. Paper, *Brandeis* 311-12 (1983).

> there must be a *physical and psychological zone of liberty* for each citizen.

Cope, *supra* at 771 (emphasis added). Distilling this analysis further, another commentator has suggested that the "right to be let alone" in Florida implies not merely privacy in the sense of physical and personal seclusion; it also implies that there is a certain sphere of personal autonomy that is beyond the scope of any governmental interference whatsoever, whether "secluded" or not. Note, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. Fla. L. Rev. 565, 571 (1981).

II. Florida Privacy Case Law

Our own prior case law fully reflects the concern for personal autonomy elaborated by Brandeis and those who have followed him. In *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533, 535 (Fla. 1987) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 457-58 (1977)), the Court found that, among other things,

> the right to privacy encompasses . . . "the interest in independence in making certain kinds of important decisions."

More recently, in *Shaktman v. State*, 553 So.2d 148, 150-51 (Fla. 1989), we emphasized:

> One of [privacy's] ultimate goals is to foster the *independence and individualism* which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.
>
> . . . . [T]he parameters of an individual's privacy can be dictated only by that individual.

> The central concern is the inviolability of one's own thought, person, and personal action. *The inviolability of that right assures its preeminence over "majoritarian sentiment" and thus cannot be universally defined by consensus.*

(footnote omitted) (emphasis added). Indeed, an individual's expectations of privacy are protected whether or not society recognizes them as reasonable, provided these expectations are not spurious. *Id.* at 153 (Ehrlich, C.J., concurring specially). These comments echoed Justice Shaw's observation some two weeks earlier that the Florida right of privacy protects " 'individual dignity and autonomy.' " *T.W.*, 551 So.2d at 1193 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).

Similarly, in *Public Health Trust v. Wons*, 541 So.2d 96 (Fla. 1989), this Court found that privacy involves a

> "deeply imbedded belief, rooted in our constitutional traditions, that an individual has a fundamental right to be left alone so that he is *free to lead his private life according to his own beliefs* free from unreasonable governmental interference."

Wons, 541 So.2d at 98 (quoting with approval *Wons v. Public Health Trust*, 500 So.2d 679, 686 (Fla. 3d DCA 1987) (emphasis added)). In the same opinion, then-Chief Justice Ehrlich cited the following rationale of our Sister Court in Massachusetts:

> "The constitutional right to privacy, as we conceive it, is an expression of the *sanctity of individual free choice and self-determination as fundamental constituents of life.* The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the *right of choice.*"

Wons, 541 So.2d at 100 (Ehrlich, C.J., specially concurring) (quoting with approval *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, ___, 370 N.E.2d 417, 426 (1977)) (emphasis added). *Accord Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978), *approved*, 379 So.2d 359 (Fla. 1980) (right of terminally ill patient to die with dignity).

In the recent case of *In re: Guardianship of Estelle M. Browning*, No. 74,174, slip op. (Sept. 13, 1990), we echoed all the case law quoted above. There, we stated that "privacy has been defined as an individual's 'control over or the autonomy of the intimacies of personal identity'." *Id.* at 7 (quoting Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 281 (1977)).

So important is the right of privacy that it is protected by the most exacting standard of judicial review. As we stated in *Winfield*,

> [t]he right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Winfield, 477 So.2d at 547 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980)). Indeed, the personal autonomy aspect of privacy is so strong an interest that few governmental infringements of that right have survived judicial scrutiny in this state. *T.W.*, 551 So.2d at 1192 (citing cases).

III. Privacy and Entertainment

I believe the present case strongly implicates the right of privacy outlined above. If the state may prohibit individuals from discreetly inquiring into matters that may interest them, whether characterized as literature, reading material, or entertainment, then the personal autonomy guaranteed by the right of privacy is illusory. Even a cursory review of censorship law discloses not merely the fact that views of obscenity have changed profoundly over time, but that a frequent result of censorship is the suppression of personal, intellectual, artistic, and literary inquiry.

Works now studied as masterpieces of English literature, such as Lord Byron's *Don Juan*, have been held to be obscene. F. Schauer, *The Law of Obscenity* 6 (1976) (quoting Craig, *Suppressed Books* 22 (1963)); A. Gerber, *Sex, Pornography, & Justice* 74 (1965) (citing *Lord Byron v. Dugdale*, 1 L.J. Ch. 239 (1823)). Similarly, American courts have ordered suppression of works now regarded as classics, such as Theodore Dreiser's *An American Tragedy*,[15] D.H. Lawrence's *Lady Chatterly's Lover*,[16] and Erskine Caldwell's *God's Little Acre*.[17]

In 1933, the United States government made a serious but unsuccessful effort to suppress James Joyce's *Ulysses*,

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[15] *See Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930).

[16] *See People on Complaint of Summer v. Dial Press, Inc.*, 182 Misc. 416, 48 N.Y.S.2d 480 (Magis. Ct. 1944).

[17] *See Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N.E.2d 819 (1950).

now considered to be one of the greatest modern novels. *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934). A similarly unsuccessful effort was directed at William Faulkner's *Sanctuary* shortly before Faulkner became one of a handful of American writers to win the Nobel Prize for literature. *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (Phila. 1949).

The attempts at censorship described in these cases reveal how difficult it is to determine what constitutes obscenity. They show that, too often, the label "obscenity" has been used as little more than a buzzword by which some partisan group has attempted to impose its views of life, art, or entertainment on others who do not share those views. Censorship, in other words, often has served as a vehicle for restricting individual autonomy. This is a result directly contrary to the spirit of Florida's privacy amendment.

For this reason, I believe that the ability to read, think and inquire as one sees fit is a vital component of the right to be let alone because it is a crucial means by which an individual may exercise a genuine, meaningful autonomy free of governmental intrusion.

This conclusion necessarily flows from our case law. As noted earlier, Florida law is settled that the individual has an interest in independence in making personal decisions, *Rasmussen*, 500 So.2d at 535, and a right to inviolability of thought, person, and personal action that is preeminent over majoritarian sentiment. *Shaktman*, 553 So.2d at 150-51. The purpose of this right is to foster "individual dignity and autonomy," *T.W.*, 551 So.2d at 1193, so that a person is "free to lead his private life

according to his own beliefs." *Wons*, 541 So.2d at 98. Florida's right to be let alone protects the "sanctity of individual free choice and self-determination as fundamental constituents of life." *Id.* at 100 (Ehrlich, C.J., specially concurring) (citing with approval *Saikewicz*, 370 N.E.2d at 426). It guarantees "an individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable." *Shaktman*, 553 So.2d at 153 (Ehrlich, C.J., specially concurring).

In sum, Florida's right to be let alone actually consists of a bundle of rights. It creates a zone of privacy protecting not merely seclusion and bodily integrity, but also guaranteeing a right to structure one's life as one sees fit so long as no avoidable harm is done to self or others. The right prohibits the government from intervening in the noninjurious aspects of personal life involving matters such as the actualization of one's own identity, spirituality, home or family life, intellect, personal opinions, and emotions.

I believe that, of necessity, this bundle of rights includes a right to obtain noninjurious reading materials and entertainment for discreet personal use. Without such a right, the self-determination and self-actualization guaranteed by the right to be let alone would be meaningless indeed. Minds forbidden to inquire are no less enslaved than minds whose thoughts are dictated by others. The right to be let alone cannot be exercised if all such material, entertainment, and information are subject to the dictates of a community censor or the strictures of a censorial criminal code. The attempt to impose such restrictions plainly rests on the kind of "majoritarian sentiment" described in *Shaktman*, 553 So.2d at 150-51.

Indeed, it appears that the state's primary motive in enforcing the 1985 and 1986 statutes is the desire to impose a particular perspective on those who do not necessarily share nor desire to share that perspective, at least within the confines of their private lives, and when no harm has been proven. The language of Florida's obscenity statute emphasizes this point. According to section 847.011(11) (1985), gauging "obscenity" requires the application of *"contemporary community standards"* to determine whether "the dominant theme of the material taken as a whole appeals to prurient interest" (emphasis added).

In the 1986 version of the statute, "obscenity" is material that "[t]he average person, applying *contemporary community standards,* would find, taken as a whole, appeals to the prurient interest." § 847.001(7)(a), Fla. Stat. (Supp. 1986) (emphasis added). By definition, "community standards" about the propriety of particular kinds of reading or entertainment constitute "majoritarian sentiment" within the meaning of *Skaktman,* 553 So.2d at 151.

I can only conclude that the statutory reliance upon "community standards" directly intrudes upon the right of personal autonomy and decision-making protected by Florida's right to be left alone. Under the requirements of this right, a community standard may not dictate whether individuals may discreetly inquire into noninjurious forms of literature, reading, and entertainment. What one thinks, views or reads in private, without harm to self or others, is an integral part of the self-actualization and personal development vital to individual autonomy.

I agree with our Sister Court in Hawaii when it concluded that

> [r]eading or viewing pornographic material in the privacy or one's own home in no way affects the general public's rights. Anyone who is offended by pornography need not be subjected to it so long as others confine their taste for it to their homes. We accept the eloquent reasoning in *Stanley*:
>
> > It is now well established that the Constitution protects the right to receive information and ideas. "This freedom . . . necessarily protects the right to receive. . . . " This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.

State v. Kam, 69 Haw. 483, ___, 748 P.2d 372, 379 (1988) (emphasis deleted) (quoting *Stanley*, 394 U.S. at 564-65). As the Hawaii Court concluded, "[s]ince a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for . . . personal use, or the underlying privacy right becomes meaningless." *Id.* at 380.

IV. Compelling State Interest

This is not to say, however, that the state may never impose reasonable regulations on access to art, reading, or entertainment materials. Under the privacy analysis now well established in Florida, the state still may restrict such access if it can establish two things: (1) a compelling state interest that is (2) advanced through the least intrusive means available. *T.W.; Winfield.*

On the first of these elements, the state contended at oral argument that obscene materials are inherently harmful. However, it has advanced no shred of evidence to prove that the specific form of entertainment at issue today has ever or will ever result in actual harm to any specific person or persons.[18] I do not believe that abstract, unproven harm is a sufficient reason to invade the right to be let alone. Rather, the state's interest only becomes compelling when it can point to definite harm to specific individuals that either has occurred, or that with reasonable probability will occur, because of the activity in question.[19]

As noted earlier, the statutory language itself suggests a second state interest: deference to "community standards." While concern for such standards may in fact

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[18] The state clearly had an opportunity to raise this argument in the trial court. Indeed, in response to the motion to dismiss, the state both mentioned and argued, albeit in a cursory manner, "[t]he harm caused or threatened to the victim or society." The trial court then conducted an extensive hearing, the transcript of which reveals no effort by the trial court to restrict the state's presentation of evidence of harmfulness. In essence, the state asks us to take judicial notice of the harmfulness of obscenity. Yet, if we may take judicial notice of any fact, it is that many experts and reasonable persons within our society have sharply differing views as to the harmfulness of various forms of obscenity or even what exactly constitutes "obscenity." Long ago we held that a matter not authoritatively settled is inappropriate for judicial notice, *e.g.*, *Makos v. Prince*, 64 So.2d 670 (Fla. 1953), a conclusion fully supported by the present evidence code. *See* §§ 90.202-.207, Fla. Stat. (1989).

[19] Of course, at a hearing to dismiss an information charging violation of the obscenity laws, the state must have an opportunity to present such evidence to the court.

be a legitimate interest for the state to advance in other areas, I do not believe it fairly can be characterized as "compelling" when privacy rights are at stake. The case law and authorities discussed above plainly show that Florida's right to be let alone embodies a strong belief that questions of art, entertainment, and personal taste not intruding upon the rights of others must be left to the conscience of the individual. In the absence of proof of actual harm to specific persons, I believe the state has failed to establish a compelling interest in invading the privacy of individuals in this context.

V. Least Restrictive Means and Overbreadth

As to the second prong of the *Winfield* test, the courts must confront two closely related questions: whether the statute at issue here has used the least restrictive means available and, as a corollary, whether it is overbroad.

Even if I assume that petitioners' activities have harmed the rights of others – such as by a public or intrusive display of allegedly obscene materials – I cannot conclude that the application of a criminal RICO statute constitutes the least intrusive means available to remedy this harm. The state just as readily could prevent such harm by way of reasonable time, place and manner restrictions contained in statutes imposing fines or other minor penalties. Similarly, laws or ordinances dealing with zoning or advertising displays also could be used to prevent such public displays.

However, the extreme penalties established by the RICO statute sweep far too broadly into the right of

personal inquiry and autonomy created by Florida constitutional law. By application of the RICO statute, the state in effect assumes power to shut down and confiscate establishments discreetly offering noninjurious entertainment or reading material for personal home use. It assumes the power to treat as "racketeers" people who merely have purchased such material on two or more occasions. This hardly constitutes a reasonable time, place or manner restriction under Florida law. *See Keaton*, 371 So.2d at 92.

Closely related to the question of least intrusive means is that of overbreadth, an issue also raised by the parties. If a statute that impinges upon privacy is overbroad, then by definition it is not the least intrusive means.

Initially, I believe that the interests protected by Florida's privacy amendment are directly analogous to, and in the context of this case overlap, interests protected by the free speech guarantees of the Florida and federal constitutions. Judicial weighing of both privacy and free speech interests requires a compelling state interest test. *See Gardner v. Bradenton Herald, Inc.*, 413 So.2d 10, 11 (Fla.) (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-02 (1979), *cert. denied*, 459 U.S. 865 (1982)). Moreover, the right of free speech itself is explicitly concerned at least with some kinds of privacy interests, particularly in the arena of obscenity law. *E.g., Keaton*, 371 So.2d at 91 (citing *Stanley*, 394 U.S. at 564-65). I thus rely on our own prior case law dealing with the overbreadth doctrine in the context of obscenity law.

In *Keaton, id.* at 87-88, for example, this Court was confronted with an overbreadth challenge mounted against another obscenity statute that made it illegal to make a "comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent" over the telephone. § 365.16(1)(a), Fla. Stat. (1977). The decision in *Keaton* in turn was based on the earlier case of *Spears v. State*, 337 So.2d 977 (Fla. 1976), which confronted still another obscenity statute prohibiting public use of "any indecent or obscene language." § 847.05, Fla. Stat. (1975). Also, this Court has addressed a similar obscenity problem in *Brown v. State*, 358 So.2d 16 (Fla. 1978), which dealt with a statute prohibiting "open profanity." § 847.04, Fla. Stat. (1975).

In *Keaton*, we began our analysis with the established principle that courts should construe a statute so as to render it constitutional, if at all possible. *Keaton*, 371 So.2d at 89. But *Keaton* also noted that this rule is qualified by the condition that courts may not engage in the essentially legislative act of varying actual intent or reading new elements into a statute, *id.*, which would violate the separation of powers doctrine.[20] Art. II, § 3, Fla. Const. Based on these rules, *Keaton* declined to judicially alter the actual language of the telephone obscenity statute, finding that it was bound by the manifest intent of the statutory wording. As we stated in *Brown*,

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[20] Indeed, Florida law requires that statutes be precisely drawn so that state officers and agents are not effectively delegated authority to infringe constitutional rights capriciously. *Keaton*, 371 So.2d at 89; *Brown*, 358 So.2d at 20 (citing art. II, § 3, Fla. Const.). *See State v. Jenkins*, 469 So.2d 733, 734 (Fla. 1985); *State v. DeLeo*, 356 So.2d 306 (Fla. 1978).

> [w]hen the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment. The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary.

Brown, 358 So.2d at 20 (citing art. II, § 3, Fla. Const.).

On the question of the overbreadth doctrine itself, *Keaton* gave an extensive rationale. We noted that the danger of overbroad statutes comes from their tendency to have a chilling effect on activities protected by constitutional law, even if these activities are only before the Court on a hypothetical basis. *Keaton*, 371 So.2d at 91. On this point, the Court eschewed the possibility of a case-by-case analysis and concluded:

> [T]he mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect. . . .

Keaton, 371 So.2d at 91-92 (quoting *Spears*, 337 So.2d at 980). Some constitutional rights are so important that even a hypothetical chilling effect must be avoided in the only way possible – by striking the overbroad statute on its face.

Based on this rationale, *Keaton* then concluded that a statute purporting to criminalize indecent or obscene telephone conversations was unconstitutionally overbroad because it had the effect of outlawing even private, consensual discussions by two adults. The statute, for

example, might have the effect of outlawing a hypothetical husband and wife's amorous conversations, or an off-color joke to a willing listener. *Id.* at 90, 92-93.

This conclusion, in turn, rested on this Court's earlier holding in *Spears* that a statute forbidding public use of indecent language also was unconstitutionally overbroad. In *Spears*, we had found that the statute, if read literally, would have criminalized even some hypothetical forms of political speech that happened to employ vulgar or offensive language. *Spears*, 337 So.2d at 980-81. *Accord The Ladoga Canning Corp. v. McKenzie*, 370 So.2d 1137 (Fla. 1979).

Similarly, in *Brown* the Court found that the statute outlawing "open profanity" swept too far into the realm of constitutionally protected speech and could even have the effect of making it unlawful for a hypothetical person to "shout profanities alone in an open field." *Brown*, 358 So.2d at 20. The Court noted, however, that speech likely to cause harm – such as "fighting words" directed at other persons – could be regulated by the state. *Id.* at 19-20.

In light of the holdings in *Keaton*, *Spears* and *Brown*, I can only conclude that the obscenity statutes at issue today also are unconstitutionally overbroad, sweeping too far into the realm of privacy and free speech rights protected by Florida law. Art. I, §§ 4, 23, Fla. Const. In effect, the statutes before us restrict the access individuals have to writings, forms of entertainment, or other similar materials.

This result is accomplished in the total absence of evidence, at least upon this record, that these materials

have harmed or will harm anyone. The only possible conclusion is that the government in this instance has undertaken to establish minimum standards of taste to which people must conform. The government has assumed authority to determine what is and is not art and to place under governmental regulation the ability of individuals to inquire into matters that may interest them. While not out-of-hand rejecting the right of privacy, this viewpoint nevertheless builds a governmental cordon around the places where such rights may be exercised.

I agree with the Hawaii Supreme Court that privacy is an illusory right if all means of access to it are subject to governmental regulation. The majority in effect says that individuals may be arrested on their doorsteps for possessing reading and entertainment material that would be lawful a few steps away, inside the front door. The absurdity of this situation is plainly revealed by applying the same logic to the possession of contraceptives. The "right" to use contraceptives indeed would be utterly worthless if the government were authorized to arrest persons up until those contraceptives were safely inside the home.

This same conclusion applies no less to the right of personal autonomy, which is an integral aspect of the right to be let alone. If the ability to inquire through reading an entertainment is restricted, so is the right to think freely and to judge for oneself. Individual thought thus becomes subservient to officially sanitized opinions imposed by decree of the state. The right of personal autonomy is impermissibly chilled.

Privacy is not, as the majority erroneously suggests, concerned solely with "objective manifestations" of privacy. Majority op., at 9. If this were true, married couples would have a right only to use those contraceptives they somehow manufactured for themselves behind closed doors. *But see Eisenstadt v. Baird*, 405 U.S. 438 (1972). If this were true, a woman would never have a right to obtain an abortion anywhere but in her own home; and even then, the government presumably could prohibit medical professionals from entering her home to assist her. *But see T.W.*

Contrary to the majority's suggestion, privacy is a right that protects both people *and* the aspects of their lives they have made private. It is a right that people *can* carry around with them, even when they are in public places and stores. People do not subject themselves to unlimited governmental scrutiny or intrusion into their lives simply because they walk out the front doors of their homes or enter a public place such as a store.

I do not even believe the majority seriously would entertain the notion that government agents can, for example, take embarrassing photographs of law-abiding citizens in a public park and then publish those photographs in a newspaper. The constitutional right to be let alone protects citizens from such official scandalmongering as completely as common law privacy rights protect against similar intrusions by private persons. *See* Prosser & Keeton, *The Law of Torts* § 117, at 866 (5th ed. 1984) (lawyers' edition); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 120 (Fla. 1988) (Barkett, J., specially concurring).

What the majority opinion fails to acknowledge is that, while the right to be let alone does in fact protect seclusion and other objective manifestations of privacy, it also protects other qualities of individual life as well. Among these are the right to be free from unwarranted governmental prying, *id.*, a right to prohibit governmentally sponsored disclosures of some kinds of personal information, *Rasmussen*, and a right to self-autonomy. *T.W. See* Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 Nova L. Rev. 693, 831-55 (1990) (discussing categories of privacy rights).

In order to reach its result, the majority erroneously analyzes this case as though it involved no interest other than "objective manifestations" of privacy such as seclusion. This is only little different from analyzing a free speech claim using nothing but fourth amendment doctrine. It prejudices the case in advance. Thus, while appearing to engage in a proper legal analysis, the majority is doing nothing of the kind. The present case clearly and unmistakably implicates self-autonomy interests that the majority simply ignores. In the process, the majority also ignores ten years of privacy jurisprudence developed by this Court and from which the majority obviously does not intend to recede.

There are other serious flaws in the majority argument. The concluding paragraphs of the majority opinion, for example, argue that *Eisenstadt* is nothing but an equal protection case, thus suggesting that privacy was not at issue there. Majority op., at 14-15. This is not true. While *Eisenstadt* certainly dealt with equal protection issues, it also dealt with privacy. Indeed, the holding of *Eisenstadt* is unintelligible unless it is premised upon a privacy right

involved in the purchase and sale of contraceptives.[21] Moreover, the majority completely overlooks the opinion in *Griswold*, which rests four-square on privacy and is the starting point from which *Eisenstadt* proceeds. Arguing that *Eisenstadt* and its predecessor, *Griswold*, have nothing to do with privacy is a gross misrepresentation of federal law.

The majority also suggests that privacy is a right that may not be raised vicariously. The majority states:

> [I]t does not appear that the defense . . . presented private individuals whose right to possess obscene materials at home had been violated by the instant action.

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[21] Indeed, the majority fails either to acknowledge or explain the following relevant statement from *Eisenstadt*:

> If under *Griswold [v. Connecticut*, 381 U.S. 479 (1965)] the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original).

Majority op., at 9. Although the majority stops short of actually holding that vicarious standing is not allowed, some persons may be misled by the majority's dictum.

However, such a reading would render the majority opinion self-contradictory. We clearly have allowed vicarious standing *without* requiring the identification of the particular third parties whose rights are being asserted. *State v. Saiez*, 489 So.2d 1125 (Fla. 1986); *Rasmussen*. The majority itself clearly assumes this to be true. In fact, the majority could not reach the merits of this case or approve the opinion under review if it seriously believed defense counsel was required to locate individuals whose right to possess entertainment materials in the home had been chilled in the present case. If such a requirement really existed, the majority would be forced to dismiss this cause for lack of standing. This, they have not done.

Indeed, under our precedents, we clearly are *required* to consider the chilling effect the obscenity and RICO statutes will have on other individuals as a result of this case, whether or not the defense has identified such persons. *Keaton; Spears; Brown*. Even a brief consideration of the majority opinion discloses how, in the real world beyond this courtroom, the chilling effect will be very severe indeed. Under the majority opinion, the possession or sale of "offensive" materials is equated with organized crime, drug smuggling, and murder-for-hire operations – all of which also may be racketeering offenses.

And the penalty? – up to life in prison, heavy fines, and the possibility that the government may seek forfeiture of assets or property used to advance this

"racketeering" activity. *Compare* § 895.02(1)(a)(28), Fla. Stat. (1989) (making sale or possession of obscene materials a racketeering offense) *with* § 895.04(1), Fla. Stat. (1989) (making racketeering a first-degree felony) *and* § 895.05(2), Fla. Stat. (1989) (authorizing forfeitures of property).

Even if we ignore the rights of free speech and privacy, these results are patently absurd and should not be permitted to stand. At a minimum, the draconian penalties endorsed by the majority are unconstitutionally excessive. Art. I, § 17, Fla. Const. They offend basic concepts of due process by establishing penalties out of all proportion to the harm that actually results in most instances from the activities involved. Art. I, § 9, Fla. Const. The state clearly can achieve the result it wishes using less drastic measures.

Moreover, under the majority opinion, the question of what is or is not obscene will be decided entirely by geographical happenstance. Material considered obscene in one part of Florida will merely be lawful entertainment elsewhere. Persons buying or selling such entertainment may be "racketeers" in one place and upstanding citizens in another. And all Floridians are subject to the concern that the compact discs, videos, recordings, or books they have obtained for use or resale might send them to state prison as racketeers.

This is unacceptable in a free society.

VI. Conclusion

For the foregoing reasons, I would hold that both the 1985 and 1986 versions of section 847.011, Florida Statutes, are overbroad and facially unconstitutional because they sweep too far into areas protected by Florida's right to be let alone and the right of free speech. Art. I, §§ 4, 23, Fla. Const. I also would hold that, as applied to materials alleged to be obscene, the RICO statutes are void for imposing an excessive punishment, article I, section 17, Florida Constitution, and for violating due process. Art. I, § 9, Fla. Const. Thus, I would quash the opinion below.

I must emphasize, however, that I would leave intact the state's ability to reach and prohibit the harmful activities of child pornographers, a subject confronted by an entirely separate statute not before us today. *See* § 827.071, Fla. Stat. (1989). *See also Osborne v. Ohio*, 110 S.Ct. 1691 (1990) (upholding Ohio child pornography statute). Similarly, we are not asked to consider, and I thus would not address, the validity of other obscenity statutes, such as the one prohibiting the sale of pornography to minors. § 847.013, Fla. Stat. (1989).

I am aware that many people in our society strongly believe that material regarded as "obscenity" is inherently distasteful. With this personal assessment, I wholeheartedly agree. However, in deciding this case, the courts are duty-bound to survey and consider the broader panorama of human rights. While I view the material at issue today as highly objectionable, this judgment itself is not a sufficient reason to permit an

unlimited and unrestrained governmental intrusion into fundamental rights.

The same right of privacy that protects the sanctity of the family home also protects personal autonomy and the right of free inquiry. This is the very essence of our democracy. Anglo-American law rests on the principle that rules of law must be neutral. While many of us in our hearts disagree with some of the activities protected by constitutional rights, we nevertheless must recognize that these same rights protect other activities that we ourselves hold dear. An unequal application of law jeopardizes not merely the despised, but also the cherished.

In this case, the application of the law approved by the majority is not merely unequal. It is excessive and out of all proportion to the actual harmfulness of the defendants' activities. It is directly contrary to Florida's privacy amendment and the guarantees of due process and free speech, not to mention common sense.

I respectfully dissent.

BARKETT, J., concurs.

Two Cases Consolidated – Application for Review of the Decision of the District Court of Appeal – Statutory Validity

Second District – Case No. 88-00246

(Polk County)

James Marion Moorman, Public Defender and Deborah K. Brueckheimer, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Tommie Lynn Stall; and Bruce L. Randall, Fort Lauderdale, Florida, John C. Wilkins, III, Bartow, Florida, and John H. Weston, Clyde

F. DeWitt and Cathy E. Crosson of Weston & Sarno, Beverly Hills, California, for Todd Edward Long,

Petitioners

Robert A. Butterworth, Attorney General and Peggy A. Quince, Assistant Attorney General, Tampa, Florida,

for Respondent

James K. Green, West Palm Beach, Florida,
Amicus Curiae for American Civil Liberities Union Foundation

John K. Aurell and Sandra Bower Ross of Aurell, Radey, Hinkle & Thomas, Tallahassee, Florida; and Charles B. Ruttenberg, James P. Mercurio, John T. Mitchell and Jeanne Philbin of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.,

Amicus Curiae for Video Software Dealers Association

David W. Ogden, Donald B. Verrilli and Bruce J. Ennis of Jenner & Block, Washington, D.C.,

Amici Curiae for PHE, Inc. and Ultra Corp.

APPENDIX B

STATE of Florida, Appellant,

v.

Todd Edward LONG, Phyllis Ann Maxwell, Cathy Irene Armstrong, Edward Dee Armstrong, John E. Shea, Tommie Lynn Stall, and CMH Enterprises, Inc., d/b/a Varsity Theatre, Appellees.

No. 88-00246.

District Court of Appeal of Florida,
Second District.

March 31, 1989.
Rehearing Denied June 3, 1989.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Peggy A. Quince, Asst. Atty. Gen., Tampa, for appellant.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Asst. Public Defender, Bartow, for appellee, Tommie Lynn Stall.

John H. Weston, Clyde F. DeWitt, and Cathy E. Crosson of Brown, Weston & Sarno, Beverly Hills, Cal., and Bruce Randall, Fort Lauderdale, and John C. Wilkins, III, Bartow, for appellees, Todd Edward Long, Phyllis Ann Maxwell, Cathy Irene Armstrong, Edward Dee Armstrong, John E. Shea, and CMH Enterprises, Inc., d/b/a Varsity Theatre.

SCHOONOVER, Judge.

The State of Florida appeals an order dismissing an amended information filed against the appellees, Todd Edward Long, Phyllis Ann Maxwell, Cathy Irene Armstrong, Edward Dee Armstrong, John E. Shea, Tommie Lynn Stall, and CMH Enterprises, Inc., doing business as

the Varsity Theatre. We find that the trial court erred in dismissing the information and, accordingly, reverse.

The instant controversy arose out of certain activities allegedly conducted at the Varsity Theatre in Polk County, Florida between September 12, 1985, and March 7, 1987. Count I of the forty-seven count information charged each of the appellees with violating the Florida RICO (Racketeer Influenced and Corrupt Organization) Act,[1] based upon forty-eight underlying alleged violations of section 847.011, Florida Statutes (1985 and Supp.1986). The alleged underlying violations of count I involved the showing, sale, distribution, and rental of obscene movies, tapes, magazines, periodicals or pamphlets, as well as articles or instruments for obscene purposes, or the knowing possession of such materials with the intent to do so. As for the remaining forty-six counts of the information, each of the appellees was charged with one or more counts of violating section 847.011, Florida Statutes (Supp.1986).

The appellees filed several pretrial motions, including motions to dismiss the information and a motion requesting the trial court to make a pretrial determination of the reasonable man standard applicable to obscenity prosecutions. After a hearing on these motions, the trial court entered an order which, among other things, dismissed the entire information. The trial court declared section 847.011 unconstitutional under both the United States and Florida constitutions based upon its conclusions that the statute violates the due process clause of

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[1] *See* §§ 895.01 – 895.06, Fla.Stat. (1985 and Supp.1986).

the United States Constitution because of vagueness, fails to conform to the standards enunciated by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), and violates the privacy provision of the Florida Constitution. In addition, the trial court found that the Florida RICO Act, when interpreted in conjunction with the prohibitions of section 847.011 relating to obscene material, has an unconstitutional "chilling effect" upon protected speech. Finally, although unnecessary to the dismissal, the trial court set forth the reasonable man standard which would be applied in the event that the case proceeded to trial. The state filed this timely appeal.

We agree with the state's contentions that the trial court erred in (1) declaring section 847.011 unconstitutional under the United States and Florida constitutions, (2) finding that the combined provisions of the Florida RICO Act and section 847.011 have an unconstitutional chilling effect upon protected speech, and (3) defining the reasonable man standard applicable to offenses involving obscene materials.

CONSTITUTIONALITY OF SECTION 847.011

The trial court's finding that section 847.011 violates the due process clause of the United States Constitution because of vagueness was based upon its analysis of the statutory definition of obscene material. All of the offenses charged in the information were based upon alleged acts which, if proven, would constitute violations of either the 1985 version or the 1986 amended version of

section 847.011(1)(a). Section 847.011(11), Florida Statutes (1985), provided:

> For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

In 1986, the Florida Legislature amended chapter 847 and replaced the foregoing definition with the following definition:

> When used in this chapter:
>
> . . . .
>
> (7) "Obscene" means the status of material which:
>
> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

See Ch. 86-238, Laws of Fla.; § 847.001, Fla.Stat. (Supp.1986). Contrary to the trial court's conclusion that section 847.011 violates due process because the statutory definition of obscene material is vague, both of the above quoted definitions have withstood void for vagueness challenges. *See Rhodes v. State*, 283 So.2d 351 (Fla. 1973); *Haggerty v. State*, 531 So.2d 364 (Fla. 1st DCA 1988). Following *Rhodes* and *Haggerty*, we hold that section 847.011 is not unconstitutional due to vagueness.

We also disagree with the trial court's finding that section 847.011 is unconstitutional for failure to comply with the standards enunciated by the United States Supreme Court in *Miller* and *Pope*. The doctrine of "authoritative construction" requires a different determination. *See Rhodes*. The trial court's erroneous conclusion was based, at least in part, on an analysis of the definition of obscene material contained in section 847.07(2), Florida Statutes (1985). That definition, however, is not applicable to offenses charged under section 847.011 and, therefore, is not relevant to the facts or legal issues involved in this case. *See* § 847.011(11), Fla.Stat. (1985); § 847.001(7), Fla.Stat. (Supp.1986).

We also find that the trial court improperly concluded that section 847.011 violates the right to privacy afforded under article I, section 23 of the Florida Constitution. Article I, section 23 provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The appellees essentially argue that section 847.011 violates the Florida Constitution because the statute prevents their customers from acquiring obscene materials which, under *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), they are entitled to possess in the privacy of their homes.

Before addressing the merits of the appellees' argument, we must first address the state's contention that the appellees do not have standing to assert the privacy

rights of their customers. We recognize that constitutional rights are personal in nature and generally may not be asserted vicariously. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Sandstrom v. Leader*, 370 So.2d 3 (Fla.1979). This restriction, however, is subject to limited exceptions when first amendment rights are involved and where individuals who are not parties to an action stand to lose by its outcome but have no effective avenue to preserve their rights. *Broadrick*. *See also, Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). The concept of vicarious standing has been applied specifically in the right of privacy area to permit a party to assert the constitutional rights of another. *See Eisenstadt; Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Florida courts have recognized this exception to the general rules of standing where enforcement of a challenged restriction would adversely affect the rights of individuals who are not parties to the lawsuit but have no effective avenue of preserving their rights themselves. *See State v. Saiez*, 489 So.2d 1125, 1127 n. 2 (Fla.1986); *Higdon v. Metropolitan Dade County*, 446 So.2d 203, 207 (Fla. 3d DCA 1984). Since section 847.011(1)(a) prohibits distribution of obscene materials, the customers whose privacy rights could possibly be violated by the statute are not subject to prosecution and, consequently, they have no effective avenue of preserving their rights. *See Eisenstadt*. In addition, enforcement of the statute will "materially impair" the ability of the appellees' customers to obtain the materials which the appellees are prohibited from distributing under section 847.011(1)(a). *See Eisenstadt;*

Griswold. We, therefore, find that the appellees have standing to assert a right of privacy claim on behalf of their customers in this case.

Having determined that the appellees have standing, we proceed to the merits of the trial court's ruling that section 847.011 is unconstitutional because it violates the right of privacy provision of the Florida Constitution. Under the United States Constitution, a person has the right to possess obscene materials in the privacy of his own home. *Stanley*. However, this right does not extend to movie theatres exhibiting obscene material only to consenting adults, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); to private shipment of obscene materials by common carrier, *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); or to acquire, sell, or import obscene material even if solely intended for private personal use, *United States v. 12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973). *See also, United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) (*Stanley* does not confer right to sell and deliver obscene material). Before the right to privacy provision was added to the Florida Constitution in 1980, our supreme court held that the statute making the sale of obscene materials unlawful was not so inconsistent with the right to privately possess such material as to render that statute unconstitutional. *State v. Kraham*, 360 So.2d 393 (Fla.1978), *appeal dismissed*, 440 U.S. 941, 99 S.Ct. 1415, 59 L.Ed.2d 630 (1979).

In this case, the appellees convinced the trial court that the right to privately possess obscene materials articulated in *Stanley* has been extended by the privacy

provision of the Florida Constitution so as to permit consenting adults to purchase or otherwise acquire obscene materials. The trial court ruled that since the right to privacy under the Florida Constitution is broader than that under the United States Constitution, it protects a citizen's right to acquire obscene materials. We do not agree with the trial court's ruling and, accordingly, hold that the protection afforded by the Florida right to privacy provision does not shield the appellees from criminal prosecution under the obscenity statute at issue.

The state asserts that widespread dissemination of obscene materials is not in the public interest and that, therefore, the state has a compelling interest in stopping its distribution. We agree that Florida's right of privacy does not confer complete immunity from governmental regulation and will yield to compelling governmental interests. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985); *Florida Bd. of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla.1983). We, however, need not decide whether the state established, or even whether the trial court gave the state an adequate opportunity to establish, a compelling state interest. Although a compelling state interest is the appropriate standard for assessing a claim of an unconstitutional intrusion of one's right of privacy, before this right attaches and the standard can be applied, a reasonable expectation of privacy must exist. *Winfield*. We find that the appellees' customers do not have a reasonable expectation of privacy while acquiring obscene materials at a public commercial establishment such as the Varsity Theatre. *See Paris. See generally, Commonwealth v. Stock*, 346 Pa.Super. 60, 499 A.2d 308 (1985); *31 West 21st St. Assocs. v. Evening of the Unusual,*

Inc., 125 Misc.2d 661, 480 N.Y.S.2d 816 (N.Y. City Civ.Ct.1984); *State v. Lunati*, 665 S.W.2d 739 (Tenn.Crim.App. 1983), *cert. denied*, 446 U.S. 938, 104 S.Ct. 1913, 80 L.Ed.2d 461 (1984). Since section 847.011 does not infringe upon the privacy rights of the appellees' customers, the compelling state interest standard is not applicable to the facts of this case. *But see, State v. Kam*, 748 P.2d 372 (Haw.1988) (court held obscenity statute violated privacy provision in state constitution and that state could not show compelling interest in preventing sale of obscene material which citizenry had right to possess in privacy of home).

It is clear that Florida's right to privacy is broader than the federal right. *Winfield*. However, it is not so broad that a person can take it with him to the store in order to purchase obscene material – even though he has the right to possess such material in the privacy of his home. While our supreme court has not considered the validity of section 847.011 under the privacy provision of the Florida Constitution, the court relied upon *Kraham* to uphold the constitutionality of this statute subsequent to the adoption of article I, section 23. *See Sardiello v. State*, 394 So.2d 1016 (Fla. 1981) (upholding section 847.011, Florida Statutes (1977)). In addition, we are unaware of any indication that the drafters of article I, section 23 were concerned with broadening the right to privacy as it relates to obscene materials or that the validity of section 847.011 is in any way affected by the privacy provision. *See, e.g., Winfield; Rasmussen v. South Florida Blood Serv., Inc.*, 500 So.2d 533 (Fla. 1987); *Florida Bd. of Bar Examiners; Shaktman v. State*, 529 So.2d 711 (Fla. 3d DCA 1988). *See generally*, Cope, *To Be Let Alone: Florida's Proposed Right of*

Privacy, 6 Fla.St.U.L.Rev. 671, 721-740 (1978) (commission's proposals on scope of privacy provision). We, therefore, conclude that the trial court erred in finding that section 847.011 interferes with the right of privacy afforded by the Florida Constitution.

CHILLING EFFECT OF RICO ACT

We disagree with the trial court's finding that the combined provisions of the Florida RICO Act and section 847.011 have an unconstitutional "chilling effect" on protected speech.[2] In *Bowden v. State*, 402 So.2d 1173 (Fla.1981), our supreme court rejected a similar challenge regarding an obscenity prosecution under the Florida RICO Act. Although the trial court found that an obscenity prosecution under the RICO Act would not violate constitutional prohibitions against cruel and unusual punishment, it determined that in view of the severe maximum sentences for a RICO conviction, the vagueness and low level of criminal intent of an

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[2] Section 895.02, Florida Statutes (1985 and Supp. 1986), provides:

As used in ss. 895.01-895.08, the term:

(1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

. . . .

23. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

obscenity offense would improperly "chill and dissuade any person from distributing or exhibiting any and all sexually oriented or sexually explicit materials, including those that are constitutionally protected."

Contrary to the trial court's conclusion, and as previously mentioned herein, the definitions of obscene material contained in the 1985 version of section 847.011(11) and the 1986 version of section 847.001(7) have both withstood challenges on vagueness grounds. *Rhodes; Haggerty.* Additionally, both the United States Supreme Court and Florida Supreme Court have held that an acceptable level of scienter exists where the statute prohibiting acts involving obscene materials requires knowledge of the nature or content of the materials alleged to be obscene. *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Johnson v. State,* 351 So.2d 10 (Fla. 1977). The scienter element of the statute at issue meets this criteria. *See* § 847.011(6), Fla. Stat. (1985 and Supp. 1986).

Although the possibility of stiff penalties from a RICO obscenity prosecution might cause cautious booksellers to remove protected material from their shelves, the mere assertion of possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional. *Fort Wayne Books, Inc. v. Indiana,* ___ U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Any form of a criminal obscenity statute will induce some tendency toward self-censorship and have some effect on the dissemination of nonobscene materials. *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). We hold that the level of self-censorship, if any, which may be caused by the combined provisions of the Florida RICO Act and the criminal laws involving obscene material,

does not render an obscenity prosecution under the Florida RICO Act unconstitutional.

REASONABLE MAN STANDARD

Finally, we agree with the state's contention that the trial court improperly defined the reasonable man standard applicable to offenses involving obscene materials. The trial court's order indicated that in the event the case went to trial, the state would be required to present evidence in regard to section 847.001(7)(c) "that the material, taken as a whole, lack[s] serious literary, artistic, political or scientific value and that no reasonable person could find such value." The appropriate inquiry under this section is whether a reasonable person would find serious literary, artistic, political, or scientific value in the alleged obscene material, taken as a whole. *See Pope; State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (1988). The trial court's ruling injects an unnecessary element of proof, i.e., that no reasonable person could find the requisite value in the material. The *Pope* case does not impose this additional element of proof on the state but merely provides the proper standard for a finder of fact to apply in determining whether the material in question is obscene. *See Haggerty; Anderson. See also, State v. Bauer*, 768 P.2d 175 (Ariz. App. 1988). During future proceedings upon remand, the trial court should rule accordingly.

In light of the foregoing, we find that the trial court erred in dismissing the information and, accordingly, reverse and remand for proceedings consistent herewith.

Reversed and remanded.

SCHEB, A.C.J., and FRANK, J., concur.

APPENDIX C

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff,	)	CASE NO. CF87-1781A7
vs.	)	
CMH ENTERPRISES, et al., Defendant.	)	

ORDER OF DISMISSAL

INTRODUCTION

This is a forty-seven count RICO Obscenity prosecution. The charges consist of one count under the Racketeering Statute charging the various other counts as predicate acts. There then follow numerous obscenity counts based on distribution of magazines and goods, hiring persons to aid in distribution, and various counts of possession of various types of articles with intent to sell. Most of the articles are video tapes intended for use on home VCR players. The charges revolve around the operation of a retail store.

The RICO Act carries a 30-year penalty. Normally the charged obscenity counts would be first degree misdemeanors carrying a penalty of one year. However, a previous conviction of obscenity is charged against most of the defendants, which, if proven, would raise the penalty to five years as a third degree felony. If proven as a felony, this creates possible penalties of 260 years. If proven as misdemeanors, the charges would result in maximum possible penalties of seventy-six years.

As a matter of interest, if a defendant were convicted of the RICO Act violation and convicted of the remaining charges as misdemeanors, he would be subject, under the sentencing guidelines, to a 4 1/2 to 5 1/2 year sentence. If convicted of the RICO Act violation and convicted of the remaining counts as felonies, a defendant would be subject to a guidelines sentence of 17 to 22 years. Although, of course, the existence of reasons for mitigation or aggravation are not known at this time, the court notes that there are relatively few such reasons at this time.

The defendant has filed numerous motions raising constitutional issues; requesting certain definitions regarding instructions and suggesting the inability to secure a fair trial because of the number of matters charged together. The court has had the benefit of extensive, well-prepared briefs, and has conducted hearings, during which the court heard extensive testimony from expert witnesses and oral argument. The various motions will be discussed individually later in this order.

DISCUSSION

The First Amendment to the Constitution of the United States of America provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment to the Constitution has had many exceptions engrafted on it, such as the ability to prohibit the crying of "Fire" in a public theater, libel, and,

more relevant to this matter, the right of the government to prohibit that which is characterized as obscene. The First Amendment to the Constitution has conflicted historically with the desire of the State to control sexual expression at various levels. The type and the manner of attempted control has varied from time to time. Even when material has been found to be obscene, many special and unique rights have been grafted onto prosecutions where the First Amendment is involved.[1]

We will in this opinion be dealing with the problems created by the interplay among the rights of the State, the rights of the disseminator of the alleged obscene materials and the rights of the public to view or read the material.

The use of such material in the United States has increased dramatically, apparently due to the wide dissemination of VCR players.[2] The impact of the change in the habits of many Americans to viewing such material in their homes as contrasted to a relatively few who viewed them in theaters primarily located in "red light" districts

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[1] For instance, the state may not invoke a prior restraint by seizing items, without which the defendant cannot continue to operate, prior to a final determination that the materials are obscene. Neutral premises and equipment, *State v. "The Bet,"* 547 P.2d 760 (Kansas 1976); only copy of film, *Heller v. N.Y.*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1983).

[2] "VCRs: Coming On Strong", TIME Magazine, December 24, 1984 (pp. 44-50); "The Crowded New World of TV", FORTUNE Magazine, September 17, 1984 (pp. 156-166); "The Video Revolution", NEWSWEEK Magazine, August 6, 1984 (pp. 50-57).

remains to be seen. Nevertheless, it must be recognized that a change has occurred.

It should be noted that this opinion is predicated on the premise that there is no allegation of any sales to minors. We are, in this case, talking about use by consenting adults, primarily in their own homes. The rulings in this order do not apply to sales to minors.

The cases that we will be concerned with begin with the case of *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The court, in an opinion by Justice Brennan, rejected the idea that all obscenity should be protected, and established a test for obscenity.[1] The reasoning in *Roth* was essentially that the First Amendment protects speech; that speech is an utterance with social value; that obscenity has no social value and therefore obscenity is not speech, and therefore not protected.

In 1969 the Supreme Court of the United States decided in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) that a citizen had the right to possess and view obscene materials in his or her own home.

The *Roth* standard did not resolve the definition problem and in 1973 the court, in *Miller v. California*, 413

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[1] It is interesting to note that Justice Brennan, after many years of struggling with the problem, has now reversed his position and believes that obscenity should be protected. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 84, 37 L.Ed.2d 446 at 473, 93 S.Ct. 2628 at 2647 (1973).

U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), established a new standard, saying:

> "a. Whether the average person *applying contemporary community* standards would find the work, taken as a whole, appeals to the prurient interest;
> b. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> c. Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value." (Emphasis added)

The three prong test still survives, although there has been confusion concerning which of the three prongs look to community standards. Florida Statute 847.07 (relating to distribution) had read as follows:

> "Considered as a whole and *applying community standards,* material is obscene if:
>
> a) Its predominant appeal is to prurient interest; that is, a shameful or morbid interest in nudity, sex or excretion;
> b) It is utterly without redeeming social value; and
> c) In addition, it goes substantially beyond customary limits of candor in describing or representing such matters. (Emphasis added)

The Florida Legislature ultimately amended and renumbered Florida Statute 847.001 (1986) to define obscenity as:

> " 'Obscene' means the status of material which:
> a) The average person, *applying contemporary community* standards, would find, taken as a whole, appeals to the prurient interests;

> b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
> c) Taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added)

It should be noted that the community standard requirement was removed from both the b) and c) prongs. It should further be noted that Florida attempts to define certain of the terms used in the standards.[1] The definitions are:

> "Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's pubic area, buttocks, or if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being committed."

In May 1987, the Supreme Court of the United States in *Pope v. Illinois*, 481 U.S. ___, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), revisited *Miller* and told us that they had clearly said in *Miller* that community standards applied to a) and b), but that the third prong was an *objective*

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[1] Apparently counsel on each side agree that, given these standards, many movies for general publication rated 'R' would be found to be obscene unless they are found to have artistic or literary value. For movies that are rated 'R' because of sexual content and not violence, it is not difficult to find simulated sex or contact with buttocks or breasts. This would mean that these movies will be saved from being obscene under the current test only if they are found to have artistic or literary value. As will be seen further in this discussion, this is perhaps the most difficult and vaguest of the tests.

standard, and defined the proper test for the third prong as follows:

> "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material, but whether a *reasonable person* would find such value in the material taken as a whole." (Emphasis added) *Pope* 481 U.S. ___ at ___, 107 S.Ct. 1918 at 1921, 95 L.Ed.2d 439 at 445.

It is pointed out in *Pope* that the First Amendment protects works that have such serious literary, artistic, political or scientific value "regardless of whether the government or a majority of the people approve of the ideas these works represent." The court further emphasizes in a footnote as follows:

> "Of course, as noted above, the mere fact that only a minority of a population may believe a work has serious value does not mean that the *'reasonable person'* standard would not be met." (Emphasis added) *Pope* 481 U.S. ___ at ___, 107 S.Ct. 1918 at 1921, 95 L.Ed.2d 439 at 445, n. 3.

THE MOTIONS

The individual motions will be discussed. It should be noted that on occasion the motions interrelate with each other and it is really necessary to achieve a full understanding of all of the motions before some motions can be fairly considered.

I. JURY SELECTION

The first motion to be discussed is the motion which defendant has made attacking the jury selection process

in Florida. Essentially the defendant argues that the use of the voter registration records instead of driver license or some other method is violative of the Sixth Amendment of the Constitution of the United States of America and Article 1, Section 16 of the Florida Constitution, because this method systematically under-represents the class of young adults in juror selection. The defendant argues that there are large differences in attitude among the age groups and that the exclusion or under-representation of the younger group is therefore extremely prejudicial. Defendant in his briefs and argument has cited numerous reports in support of this contention.[1] For the purposes of this argument, the court will assume that at an evidentiary hearing the defendant could prove these matters, recognizing that if the defendant should prevail on this motion it would be necessary later to have such an evidentiary hearing. In discussing any such attack, it must first be recognized that the group identified must be a cognizable group under *Durren v. Mississippi*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed. 2d 579 (1979). Defendant presents a logical argument that young people as a group should be considered because of the tremendous differences between the young and the old where sexually

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[1] Department of Commerce, Bureau of the Census: "Current Population Reports – Voting and Registration in the Election of November 1976."
"Current Population Reports – Voting and Registration in the Election of November 1984."
1980 Census of Population – Volume I – Characteristics of the Population – Part II – Florida, August 1982.
Attorney General's Commission on Pornography – Final Report (U.S. Department of Justice, Washington, 1976).

explicit material is considered. Common sense would indicate that they are correct on this contention.

However, *Bryant v. State*, 386 So.2d 237 (Florida 1980), holds that young people are not a class to be recognized. Defendant contends that obscenity, because of the extreme differences in attitude, is a different matter, and that the matter should be revisited. The appellate court has spoken and this issue is closed to review by this court.

II. ABILITY TO SEAT A JURY

The next motion by the defendant moves to dismiss the information because of the alleged inability to seat a fair and impartial jury. The court heard testimony from three experts in the fields of psychology and psychiatry, two for the defense and one for the state, and finds that, although there are differences in the testimony, in many critical aspects all three experts agree. The testimony presented went beyond the nature of the jury selection problem and delved into other areas. The differences among them, although not great, appeared in those areas rather than in the areas concerning jury selection and potential harm to jurors.

It will be necessary for the jury to view, in their entirety, approximately 20 to 24 hours of video and movie film. The films average 90 minutes each. The court has previously determined that it would be unreasonable to ask the jury to view more than two films or approximately 3 hours a day. This means that this portion of the trial would cover 7 to 8 working days, during which the

jury would view 3 hours of film each day. The entire trial is estimated to take at least 3 weeks.

The experts were of the opinion that, after the initial reaction of jurors to the film, which would vary depending upon the jurors' views and philosophies, extreme boredom would ultimately set in and, in some cases, anger at the number of films. There would clearly be some jurors who could not distinguish between the films or remember the necessary details, and make the requisite judgments that would be required of jurors in a case such as this. The experts further testified that, although most people would not suffer harm from viewing such a large number of films, there are some few individuals who could suffer serious harm from such a viewing. One of the problems that surfaced was the fact that, short of a full psychological examination, such people could not be clearly identified during jury selection. The court was given suggestions of several questions that would help identify jurors who might be at risk. The experts suggested that viewing in something other than the courtroom setting, such as a movie theater where the jury was seated separately from the other courtroom participants and some distance from them might help alleviate the problem. They suggested viewing less than 2 films a day. One problem appears to be that many people would be uncomfortable watching any sexually explicit film, obscene or not, in a public, formal setting. There is, of course, no way they can be viewed privately or at home, as suggested by the experts.

The court feels that jury selection will be extremely lengthy and there will be many people excused for cause

as well as peremptorily because of the length and nature of the trial.

Although this court is extremely concerned about possible harm to jurors because of the State's election to try such a large number of films and material at the same time, this court feels that it has no legal alternative but to proceed with jury selection if the case should otherwise be ready for trial. The motion raises many issues that would undoubtedly generate problems at trial and cause post-trial appeals.

However, the motion should be denied.

III. REASONABLE MAN STANDARD

The next motion for consideration is that requesting a pretrial determination of the reasonable man standard so that counsel may be more appropriately prepared for trial. What does the reasonable man standard, as established by *Pope* mean? *Pope* suggests that the first place to look is to the reasonable man of negligence law. The reasonable man has been defined as:

> "He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is always up to standard. Nor is it proper to identify him with any member of the very jury which is to apply the standard; he is rather a personification of a *community ideal* of reasonable behavior, determined by the *jury's social judgment.*" *Prosser and Keeton on Torts,* Fifth Edition (West Publishing, 1984), page 175. (Emphasis added)

> "Thus the standard represents the general level of moral judgment of the *community,* what it

> feels ought ordinarily to be done, and not necessarily what is ordinarily done, although in practice the two would very often come to the same thing." *Harper & James – The Law of Torts*, Vol. 2, 1956, § 16.2 (902). (Emphasis added)

It would appear then that the reasonable man of negligence normally is rooted in the standards of the community.

Pope tells us that the test is whether a reasonable man would find serious literary, artistic, political or scientific value in the material. We are further instructed that this is *not* a *community standard* and it is suggested in *Pope* that an instruction based on the above statement would not confuse the jury any more than a standard reasonable man instruction in negligence. This overlooks the fact that negligence is normally a reasonable man *in the community*. It appears to this court not to be the objective standard sought after in *Pope*. This thought is confirmed by the fact that the State in the *Pope* case argued that the community standard function was the functional equivalent of a reasonable man standard.[1] The reasonable man standard of *Pope* is an objective, not subjective, standard. It is not a community standard. *Pope* refers to the reasonable man of tort law. That reasonable man of tort law is the personification of community ideals and the jury's social judgment. This argument bites its own tail.

Pope further teaches that the reasonable man does not mean the majority of people, but that, if only a minority of people believe that material has value the standard

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[1] *Pope*, supra, footnote 3.

would be met. Justice Scalia expresses considerable concern as to the definition of artistic value and suggests that value in art is in many respects a matter of taste. Certainly a lover of hillbilly music arguing with a lover of classical music would be inclined to agree with this view. The same might be said of those discussing modern popular dance with those who find value in ballet. A further consideration of the concurring and dissenting opinions in *Pope* compound the trial judge's problem in deciding what is meant by the *Pope* decision. If the jury finds that one reasonable man (mythical or real) believes the material has value, does this prevent the material from being found obscene? It would appear that one such person is sufficient, although it would also appear that the Supreme Court in *Pope* was not talking of a real person but of a mythical person. However, it would appear clear that the testimony of experts and lay people at trial as to their finding of value would clearly be admissible.

It would, of course, be possible for the trial court to simply repeat the statements from the *Pope* case condensed into a jury instruction, telling jurors that the third prong was an objective test and did not use community standards. Unless the jury is given more, this is a backdoor way of returning the third prong of the obscenity test to a community standard. That is clearly not the intent of the Supreme Court.

There is a need to be precise in defining obscenity. *Commonwealth v. Dane Entertainment Services, Inc.*, 490 N.E. 2d 783, 784 (Mass. 1986). Additionally, "[a]lthough the jury's experience in everyday life equips it to determine what the hypothetical 'reasonable man' would do in

a given circumstance, judges or jurors lacking in experience in the field of pornography . . . face a greater challenge. . . ." *U.S. v. Various Articles of Obscene Merchandise,* Schedule No. 2102, 707 F.2d 132, 136 (2d Circuit) 1983, declined to be followed by *U.S. v. Various Articles of Obscene Merchandise, Seizure No. 170* (7th Cir. 1984).

Defining an "objective" standard can be difficult, as illustrated by the court's attempt in *Moses v. County of Kenosa,* 649 F.Supp. 451, 455, 456 (E.D. Dis. 1986):

> "[Adult bookstore owners argue] that men of common intelligence would be forced to guess at the meaning of 'objective standards' (of which the reasonable person standard is one) and would differ as to the application of that term. . . .
>
> The [owners] acknowledge that a national standard is to be employed by the fact finder in coming to a determination as to whether the work lacks serious value. They argue, however, that in no dictionary which they have consulted was objective defined as national, nor would an average man, other than perhaps an attorney, so construe the word. They point to the fact that the word objective can mean many things, with the most obvious definition being the opposite of subjective. The court agrees that this is the most logical definition of objective in the context of a standard . . . Thus, an objective standard would be a measure unaffected by the prejudices or character of the relevant community . . . [T]he term objective standard is clear on its face and needs no further definition."

To date, only one court has attempted to apply the *Pope* (objective standard) reasonable person test to an obscenity case, with questionable success. The court in

People v. McGeorge, 510 N.E.2d 1032, at 1038 (Ill. App. 1987) stated:

> "Pursuant to . . . *Pope* . . . We cannot uphold an obscenity conviction . . . unless we can conclude that no rational juror, if properly instructed, could find value in the materials. We believe that a rational juror . . . could have accepted [expert] testimony and concluded that the materials in question had some limited value, either as an aid in achieving marital balance, or as a safety valve to prevent criminal behavior."

It is unclear whether the court in *McGeorge* was viewing the value of the materials as being what the expert had described as "some individuals in marriage" and "some people who are less well adjusted than the norm", or to society as a whole. Consequently, the case offers little actual guidance as to who that court perceives should be the reasonable person to determine the value of allegedly obscene materials. It clearly approves the use of experts. This court feels that, absent some disavowal of belief in the expert in *McGeorge* it is reasonable to suspect that the court was accepting the expert's opinion as to value to "some individuals in marriage" and "some people who are less well adjusted than the norm".

This court feels that the reasonable man must be defined as other than community standards, perhaps a national standard, and that if so much as one mythical reasonable artistic, literary or scientific man could find value there can be no conviction.

Prior to *Pope*, the State was not required to prove obscenity by testimony. The material was entered in evidence and the jury then determined whether the material was obscene. The defendant might or might not introduce

evidence. This unusual situation existed because the jury knew what the community standards were. Since the third prong is an objective, not subjective, standard, it will be necessary for the State to present evidence that no reasonable person could find value as defined in the third prong.

IV. RIGHT TO PRIVACY

The defendant next moves to dismiss the information grounded upon the underlying statute's violation of Florida's constitutional right to privacy. The Florida constitutional right of privacy provides:

> "Right of Privacy.
>
> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Florida Constitution, Article 1, Section 23.*

The defendant does not argue that these defendants as such have a constitutional right to privacy in the store. The defendant is arguing that, since citizens have the right to possess this material in the home, to the extent this material is intended for such use, there is a right in the citizens to buy material which they have a constitutional right to possess.

Before the arguments of the motion can be addressed, a determination must be made as to whether the defendants have standing to raise this issue.

The State vigorously argues that there is no standing. The State urges that, under the doctrine of *Broderick v. Oklahoma*, 413 US 601, 610 (1973), defendant has no standing to raise a right that belongs to a homeowner. The State further urges that the corporate defendant would have no right to privacy in any event. See *Bellis v. United States*, 417 US 85, 90 (1974). As to this latter argument, the State misconstrues that it is the corporation's right to privacy that is invoked. It is not. The question is whether these defendants have standing to invoke the right of another.

The defendants in this case have standing to raise the privacy rights of those who have purchased or may wish to purchase, rent or exhibit said adult sexually explicit materials for home use. This principle is clearly established by the landmark privacy rights case, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1961), which itself involved a party vicariously asserting the rights of others. In *Griswold*, the Planned Parenthood director convicted under the statute criminalizing dissemination of contraceptive information was held to have standing to assert the constitutional rights of married people in challenging the law. Citing an extensive list of cases sanctioning such vicarious standings, the Court noted that the rights of married persons to receive such information would be "diluted or adversely affected" unless the appellant was allowed to assert those rights.[1]

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[1] See also *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

The federal court has clearly held that a citizen has a right to possess obscene material in his home.[2] The federal right does not extend to give that citizen a right to buy the material which he has the right to possess in his home.[1] This motion does not affect any film alleged to have been shown on the premises.

The defendant concedes that he has no right to advance his claim under the federal constitution under the current holdings. His argument is addressed to the Florida constitutional right of privacy. This, of necessity, means that the Florida privacy rights must be broader and more extensive than the federal rights or the defendant's argument must fail, even if the defendant had standing to raise the issue.

The University of Florida Law Review has observed as follows:

> "Construing the State right to protect only what the Federal right already protects would render the new provision superfluous. Furthermore, construing the State right to protect less than its federal counterpart is equally contrary to reason. The desired harmony [between the two constitutional privacy provisions] can only be achieved by construing Florida's constitutional right of privacy as related to, but broader than, the federal right [footnotes omitted]." 33 U.F. Law Review, 565, 581-82 (1981).

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[2] *Stanley, supra.*

[1] *Stanley, supra.*

The U.S. Supreme Court, in rejecting by a 5 to 4 vote the attempt to claim a privilege to possess obscene material outside of the home or to purchase that material, has met with substantial criticism.[2]

Article I, Section 23 of the Florida Constitution affords greater protection for privacy than does the United States Constitution. The intent of the drafters of Article I, Section 23 of the Florida Constitution and the intent of the citizenry when voting to ratify it was to afford the citizens of Florida greater protection for privacy than that provided by the United States Constitution.

Included within the scope of the greater protection afforded by Article I, Section 23 of the Florida Constitution is that protection not provided by the United States Constitution as interpreted in *United States v. Orito*, 413 U.S. 139, 93 S. Ct. 4674, 37 L.Ed.2d 513 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973).

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[2] See *U.S. v. Orito*, 413 US at 146 (Justice Douglas dissenting). Further, in *US v. 12 1200 ft. reels of Super 8 mm. Film, et al.*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) it is said in dissent, "Finally, it is ironic to me that in this nation many pages must be written and many hours spent to explain why a person who can read whatever he desires (citing *Stanley v. Georgia*), may not, without violating a law, carry that literature in his briefcase or bring it home from abroad. Unless there is that ancillary right, one's *Stanley* rights could be realized, as has been suggested, only if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be able to read it in his study."

Those who drafted and enacted Article I, Section 23 of the Florida Constitution were aware of the limitations upon the right of privacy articulated in *United States v. Orito, supra,* and in *Paris Adult Theatre I v. Slaton, supra.*

Article I, Section 23 of the Florida Constitution extends the right of privacy from the Federal Constitution articulated in *Stanley, supra,* protecting private possession of adult sexually explicit materials, to allow consenting adults to acquire and view such materials without regard to whether those materials might be violative of F.S. 847.011.

V. *SCIENTER,* EXCESSIVE PUNISHMENT AND CHILLING EFFECT

The next motion argues that the information should be dismissed because of the unconstitutionality of the underlying statute because of excessive punishment, insufficient *scienter* and the resulting chilling effect on First Amendment rights.

As mentioned in the beginning of this opinion, the possibilities of punishment are far greater than in the usual misdemeanor obscenity prosecution, whether the total penalties or just the sentencing guidelines are considered. In some respects the sentencing guidelines increase the severity of the problem because the trial court now lacks freedom to determine an appropriate sentence, but is, except in certain limited instances, bound by the sentencing guidelines.

The defendant argues the extreme severity of the penalty and points out that, even short of the death

penalty, statutes can be found to cause cruel and unusual punishment. The most convincing of these cases is *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). This argument by itself, although interesting, is not conclusive and this court rejects the argument insofar as it suggests that the statute is unconstitutional because of cruel and excessive punishment. The Legislature has the right to set whatever punishment it feels appropriate.

An extremely low level of *scienter* is required in order to sustain a conviction under the Florida Obscenity statutes.[1]

In addition, as is discussed more fully elsewhere in this opinion, it is extremely difficult to determine what material will be determined to be obscene. The federal courts are fond of referring to "bright line" tests. Although the courts have attempted for some years to define a "bright line" for obscenity, the line is dim to the point of being indistinguishable.

When the vagueness of the line is coupled with the low level of *scienter* required and the extremely severe penalties involved, the chilling effect of the RICO approach to obscenity becomes apparent.

The Florida RICO action is premised on two predicate acts. That is, if a defendant is found guilty of two of the enumerated charges, which could be simply the possession of two reels of obscene video tape on the same

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[1] 847.011 (1)(b) The knowing possession by any person of three or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is *prima facie* evidence of the violation of said paragraph.

day, he would be guilty of racketeering. Once the two predicate acts are proven, no other real proof of a pattern of racketeering is required.

It is clear that this Act may be used not only to prevent the sale and exhibition of obscene materials by racketeers, but also to chill and dissuade any persons from distributing or exhibiting any and all sexually oriented or sexually explicit materials, including those that are constitutionally protected. Because of the extraordinarily severe penalties for guessing wrong, few individuals will be willing to accept the extreme penalty for a wrong guess.

Thus the State has conceived an unreviewable prior restraint by virtue of the very existence of this statute in its present form as applied to obscene materials.

This court is mindful that the Florida RICO Act, although addressed to racketeering, can be applied to "Mom and Pop" enterprises as well as those who are actually racketeers. The Legislature, in its desire to permit the prosecution of racketeers without proof of things that are frequently difficult to prove, has opened the door for abuse.

The Florida RICO Act has been held constitutional in *Bowden v. State*, 402 So.2d 1173 (Fla. 1981), and *Cantrell v. State*, 403 So.2d 977 (Fla. 1981). Obscenity was involved in the *Cantrell* case. The analysis is complicated by the fact that *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) has been decided since the initial

review of the Florida RICO Act.[1] This court believes that the basic constitutionality of the Florida RICO Act as applied to drug trafficking and other matters is not in question. However, its constitutionality as applied to obscenity is seriously in question because of its chilling effect on First Amendment rights.

It may be one thing to have a "dim line" in a misdemeanor statute. Although it is never openly discussed, less serious charges appear to have vaguer definitions. There is no vagueness when we get down to discussing death. The statute prohibiting obscenity is a classically vague misdemeanor. Historically there have been vague provisions for vagrancy, abominable and detestable crimes against nature, and like matters. Certainly "careless driving" is as broad a definition as you could get. This court respectfully suggests that if careless driving were a first degree felony it would receive a far more carefully delineated definition.

The RICO statute, as used in this case, clearly has an unconstitutionally chilling effect on First Amendment rights under the U.S. Constitution.

VI. VAGUENESS

The next motion to be considered is the defendant's motion to dismiss because of the vagueness of the underlying obscenity statute and its consequent unconstitutionality.

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[1] *Kolender*, see *infra*, p. 17. It essentially, in dealing with vagueness in a statute, suggests that statutes must establish minimal guidelines to guide law enforcement.

The defendant notes that even as the majority in *Miller v. California*, 413 US 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) formulated a new definition of obscenity, the majority acknowledged the inherent difficulty of any attempt to define obscenity. Thus the court reviewed in some detail the "tortured history of the court's obscenity decisions" (413 US at 20-22).

Nevertheless, the majority stated at page 27:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core' sexual conduct* specifically defined by the regulating state law as written or construed. We are satisfied that these specific prerequisites will provide *fair notice to a dealer* in such materials that his public and commercial activities may bring prosecution." (emphasis added)

The court clearly thought it was creating a "bright line".

It did not, and finally Justice Brennan, who authored the *Roth* opinion, joined Justices Stewart and Marshall in *Paris Adult Theatre I v. Slaton* 413 US 49 at 84, 93 S.Ct. 2628 at 2647, 37 L.Ed.2d 446 at 473 (1973), in saying in dissent:

> "But after sixteen years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas [for defining obscenity] including the one announced today, can reduce the vagueness to a tolerable level, while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state

> power must resort to such indefinite concepts as 'prurient interest', 'patent offensiveness', 'serious literary value', and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we know it when we see it [citation omitted], we are manifestly unable to describe it in advance, except by reference to concepts so illusive that they fail to distinguish clearly between protected and unprotected speech."

It has been said that almost every case is marginal and that there is very little probability of regularity in obscenity decisions by state and lower federal courts. *Miller* at pages 91 and 92. The difficulty and inherent vagueness of the reasonable man standard is pointed out by Justice Stevens in *Smith v. United States*, 431 US 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), when he says:

> "The diversity within the nation which makes a single standard of offensiveness impossible to identify is also present within each of the so called local communities, in which litigation of this kind is prosecuted.
>
> * * *
>
> The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with even-handed consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting, and an entirely different reaction in a social context." (431 US at 315)

* * *

> In the final analysis the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question, rather than by the predictable application of rules of law.
>
> * * *
>
> "In my judgment, the line between communications which offend and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment." 431 US at 316.

Justice Scalia has joined this group in his concurring opinion in *Pope, supra,* in saying:

> "that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada and art in the representation of a soup can." 107 S.Ct. at 1923.

He then observes:

> . . . "[f]or the law courts to decide 'what is beauty' is a novelty, even by today's standards."

It is fairly clear that Justice Scalia believes that the *Miller* standard should be changed but that the court was not asked to do so in the *Pope* case.

Further complicating the matter is the change in the mores of contemporary adults, which obviously affect what juries may do.

To further illustrate the problem of determining what will be found obscene, certain films, familiar to those who have been involved in obscenity prosecutions have been found to be not *obscene*. The video cassettes *Deep*

Throat, The Opening of Misty Beethoven, Debbie Does Dallas, Insatiable, Star Virgin, Behind the Green Door, High School Memories, The Ecstasy Girls, Little Girl Blue, and others have been found not obscene. Magazines such as *Horny, Color Orgy No. 8 and 12, Color Climax 75, Top Porno, Anal Sex No. 37, Lust No. 3,* and others have been found not obscene. The court found that, although they were unquestionably examples of hard-core pornography and included explicit sex scenes singly and in groups, and including portrayals of genitalia, sexual intercourse, fellatio and masturbation, they were not obscene. *United States v. Various Articles of Obscene Merchandise,* 709 F.2d 132 (2nd Cir. 1983).

The argument is made that no more precise definition is possible and that a jury will "know it when they see it". It is clear that a precise definition is possible. An example is that used by the San Bernardino County District Attorney office in San Bernardino, California, according to the exhibit attached to one of the pleadings herein.[1] This court does not recommend this particular "bright line", but suggests it as an example of the fact that definitions can be clearly drawn. The present definition would cover many 'R' rated movies and modern, widely sold novels.

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[1] That office, although the State has a statute similar to Florida's, defines material for which they will prosecute as follows: "1) Rape or forced sex; 2) bestiality, including masturbation of animals; 3) sex with minors, including persons depicted as minors, such as would pander to sexual acts with minors; 4) urination and/or defecation; 5) fist, foot, hand or limb insertion beyond finger or fingers; 6) simulation homicide or dismemberment, and 7) infliction of pain (torture), in connection with obscene material."

An important factor is the impact of *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In that case a California statute requiring a suspect to provide "credible and reliable" identification or be subject to misdemeanor arrest was before the court. The court found that

> "the most important aspect of the vagueness doctrine is not actual notice [to the accused] but the other principal element – *the requirement that a legislature establish minimal guidelines to govern law enforcement*". (Emphasis added) 103 S.Ct. at 1858.
>
> * * *
>
> "Where the Legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep' [that] allows policemen, prosecutors and juries to pursue their personal predilections." 103 S.Ct. at 1858-1859.

The Supreme Court further noted that the California statute in question was "unconstitutionally vague on its face because it encourages arbitrary enforcement." 103 S.Ct. at 1860.

This decision by its emphasis on the fact that the most important element in the 'void for vagueness' doctrine is the capacity of a statute to invite arbitrary or erratic law enforcement, clearly creates problems with the *Miller* definition. The *Miller* majority considered the vagueness of its definition only with regard to "fair notice" that it allegedly gave dealers. That definition has not been considered in light of *Kolender*.

This must be considered in light of the fact that in the *Pope* case, *supra*, four of the justices of the Supreme Court

have said they wish to reconsider. Justice Scalia, representing a conservative portion of the court, has suggested in *Pope* that "all of today's opinions, I suggest, display the need for re-examination of *Miller*."

The statute is unconstitutionally vague.

VII. CONFORMITY WITH *MILLER*

The next motion is the Florida Statute fails to conform to the standards of *California v. Miller*.

As explained earlier in this opinion, the Florida Statute was amended to remove the community standard requirement from prongs b) and c) when the statute was redefined. If one attempts to supply standards by construing the statute grammatically to include the community standards in prongs b) and c) (which would be an incorrect grammatical construction in any event), it would make the statute unconstitutional and it is a cardinal rule that statutes should not be interpreted in that manner.

The doctrine of authoritative construction[1] would arguably supply the missing standards in prongs b) and c) by inserting whatever might be enunciated by the U.S. Supreme Court from time to time. Besides the reservations this court has about writing a blank check to the U.S. Supreme Court, however much respect this court has for it, a more serious problem arises. The legislature

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[1] *First Amendment Foundation of Florida, Inc. v. State*, 364 So. 2d 450 (Fla. 1978); *Rhodes v. State*, 283 So.2d 351 (Fla. 1973); *State v. Reese*, 222 So.2d 732, 733 (Fla. 1969).

specifically deleted community standards from both prongs. To fly in the face of legislative intent and to re-insert community standards into the second prong is inappropriate. Authoritative construction cannot and should not be used to re-do that which the legislature clearly and recently did. Its motive in removing community standards from the second prong is not clear. They failed to give any standard for prongs b) and c). There is no indication that the legislature intended the statute to be amended by the U.S. Supreme Court from time to time.

This motion also asks for a definition of prurient interest. There is clearly a problem in the current definitions used for that term in jury instructions. Prurient is not synonymous with erotic or sexually explicit material. This court feels that there will be serious problems with the instructions on this point. There may be problems as to whether the State must present evidence that the material arouses more than normal sexual interest. These matters are best left for a later time, with the court at this time pointing out that prurient does not mean sexually explicit, that it means morbid or shameful. Certain people feel that sexually explicit pictures are morbid or shameful. The law says otherwise.

The two final motions are those filed on behalf on the defendant Tommie L. Stall by the Public Defender's office. These motions are moot by virtue of the rulings made herein.

Therefore, as to each of the motions, it is

ORDERED AND ADJUDGED as follows:

1) The Motion to Strike Jury List is denied.

2) The Motion to Dismiss for inability to seat a fair jury is denied.

3) The Motion for PreTrial Determination of Reasonable Man Standard is partially granted and partially denied. The court rules that the traditional definition of reasonable man will be modified as follows, if the case goes to trial:

a) Reasonable man does not refer to community standards or to jurors' social judgment.

b) If *a* reasonable man could find serious literary, artistic, political or scientific value, the material is not obscene.

c) Testimony of experts and lay persons will be permitted.

d) The State must present evidence that the material, taken as a whole, lack serious literary, artistic, political or scientific value and that no reasonable person could find such value.

The remainder of the motion is denied at this time.

4) The Motion to Dismiss as Unconstitutional as violating the Florida Right to Privacy is granted insofar as it is applied to material offered for sale or rent and intended for home use. Statute is declared in violation of Florida Constitution as applied to such material.

5) The Motion to Dismiss as unconstitutional because of excessive punishment, insufficient *scienter* and chilling effect is:

a) Denied as to excessive punishment

b) Denied as to *scienter*

c) Granted as to chilling effect on First Amendment Rights. The RICO Statute as applied to obscenity actions is declared to be in violation of the U.S. Constitution.

6) The Motion to Dismiss as violative of the due process clause of the U.S. Constitution because of vagueness is granted and the statute is declared unconstitutional.

7) The Motion to dismiss upon failure of underlying obscenity statute to conform to *Miller* and *Pope* is granted and the obscenity statute as it exists is declared to be in violation of the U.S. Constitution.

8) This case is dismissed with prejudice.

DONE AND ORDERED at Polk County, Florida, this 8th day of January, 1988.

/s/ E. Randolph Bentley
E. RANDOLPH BENTLEY,
Circuit Judge

Copies furnished to:
Ronald A. Herring
John C. Wilkins, II
John H. Weston
Clyde F. DeWitt
Lawrence Shearer

APPENDIX D

SUPREME COURT OF FLORIDA

TOMMIE LYNN STALL, Petitioner, v. STATE OF FLORIDA, Respondent.	*	WEDNESDAY, DECEMBER 19, 1990 CASE NO. 74,020 District Court of Appeal, 2d District – No. 88-00246
TODD EDWARD LONG, et al., Petitioners, v. STATE OF FLORIDA, Respondent.	*	*CONSOLIDATED CASES* CASE NO. 74,390

Petitioners Todd Edward Long, et al.'s Motion for Rehearing filed in the above causes is hereby denied.

SHAW, OVERTON, McDONALD, EHRLICH and GRIMES, JJ., concur. BARKETT and KOGAN, JJ., dissent.

TC

cc: Hon. William A. Haddad, Clerk
Hon. E. D. Dixon, Clerk
Hon. E. Randolph Bentley, Judge
Deborah Brueckheimer, Esquire
Bruce L. Randall, Esquire
John C. Wilkins, III, Esquire
John H. Weston, Esquire
Clyde F. DeWitt, Esquire
Cathy E. Crosson, Esquire
Peggy A. Quince, Esquire
James K. Green, Esquire
John K. Aurell, Esquire
Sandra Bower Ross, Esquire

Charles B. Ruttenberg, Esquire
James P. Mercurio, Esquire
John T. Mitchell, Esquire
Jeanne Philbin, Esquire
David W. Ogden, Esquire
Donald B. Verrilli, Esquire
Bruce J. Ennis, Esquire

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

SEAL

APPENDIX E

FLORIDA OBSCENITY STATUTES

FLA. STAT. §§ 847.001-847.07

847.001. Definitions

When used in this chapter:

(1) "Computer" means an electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device.

(2) "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

(3) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, or sexual excitement when it:

(a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

(4) "Minor" means any person under the age of 18 years.

(5) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than

a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

(6) "Person" includes individuals, firms, associations, corporations, and all other groups and combinations.

(7) "Obscene" means the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

(8) "Sadomasochistic abuse" means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself.

(9) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, "sexual battery" does not include an act done for a bona fide medical purpose.

(10) "Sexual bestiality" means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.

(11) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

(12) "Sexual excitement" means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

(13) "Simulated" means the explicit depiction of conduct set forth in subsection (11) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Added by Laws 1986, c. 86-238, § 1, eff. Oct. 1, 1986.

847.011. Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1)(a) Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed,

or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) The knowing possession by any person of three or more identical or similar materials, matters, articles, or things coming within the provisions of paragraph (a) is prima facie evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper,

written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of violating this subsection, thereafter violates any of this provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this subsection is guilty

of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who knowingly promotes, conducts, performs, or participates in an obscene show, exhibition, or performance by live persons or a live person before an audience is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who, after having been convicted of violating this subsection, thereafter violates any of its provisions and is convicted thereof is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(6) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(7) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section; and, upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer, the same shall be

delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and, after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(8)(a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney for a municipality in the name of the state upon the relation of such state attorney or attorney for a municipality.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney or attorney for a municipality requests a judge of such court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within 3 days after the making of such request. No such order shall be made unless such judge is satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made; however, such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the

complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within 1 day after joinder of issue, and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(d) In any action brought as provided in this subsection, no bond or undertaking shall be required of the state attorney or the municipality or its attorney before the issuance of a restraining order provided for by paragraph (b), and there shall be no liability on the part of the state or the state attorney or the municipality or its attorney for costs of for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(e) Every person who has possession, custody, or control of, or otherwise deals with, any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this subsection, is chargeable with knowledge of the contents and character thereof.

(9) The several sheriffs and state attorneys shall vigorously enforce this section within their respective jurisdictions.

(10) This section shall not apply to the exhibition of motion-picture films permitted by s. 847.013.

Amended by Laws 1986, c. 86-238, § 2, eff. Oct. 1, 1986.

847.012. Prohibition of sale or other distribution of harmful materials to persons under 18 years of age; penalty

(1) As used in this section, "knowingly" means having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and context of any material described herein which is reasonably susceptible of examination by the defendant, and

(b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

(2) It is unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) Any picture, photograph, drawing, sculpture, motion-picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct and which is harmful to minors, or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter defined in s. 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which, is harmful to minors.

(3) Any person violating any provision of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Every act, thing, or transaction forbidden by this section constitutes a separate offense and is punishable as such.

(5)(a) The circuit court has jurisdiction to enjoin a violation of this section upon complaint filed by the state attorney in the name of the state upon the relation of such state attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney requests a judge of such court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within 3 days after the making of such request. No such order shall be made unless such judge is satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within 1 day after joinder of issue, and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney before the issuance of a restraining order provided for by paragraph (b) and there shall be no liability on the part of the state or the state attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with, any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(6) The several sheriffs and state attorneys shall vigorously enforce this section within their respective jurisdictions.

(7) This section does not apply to the exhibition of motion pictures, shows, presentations, or other representations regulated under the provisions of s. 847.013.

Amended by Laws 1983, c. 83-77, § 1, eff. Oct. 1, 1983; Laws 1986, c. 86-38, § 2, eff. Oct. 1, 1986; Laws 1986, c. 86-238. § 2, eff. Oct. 1, 1986.

847.0125. Retail display of materials harmful to minors prohibited

(1) "Knowlingly" defined. – As used in this section, "knowingly" means having general knowledge of, reason

to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

(2) Offenses and penalties. –

(a) It is unlawful for anyone offering for sale in a retail establishment open to the general public any book, magazine, or other printed material, the cover of which depicts material which is harmful to minors, to knowingly exhibit such book, magazine, or material in such establishment in such a way that it is on open display to, or within the convenient reach of, minors who may frequent the retail establishment. Such items shall, however, be displayed, either individually or collectively, behind an opaque covering which conceals the book, magazine, or other printed material.

(b) It is unlawful for anyone offering for sale in a retail establishment open to the general public any book, magazine, or other printed material, the content of which exploits, is devoted to, or is principally made up of descriptions or depictions of material which is harmful to minors, to knowingly exhibit such book, magazine, or material in such establishment in such a way that it is

within the convenient reach of minors who may frequent the retail establishment.

(c) A violation of any provisions of this section constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Added by Laws 1978, c. 78-273, § 1, eff. July 1, 1978. Amended by Laws 1979, c. 79-96, § 1, eff. Oct. 1, 1979; Laws 1983, c. 83-77, § 2, eff. Oct. 1, 1983; Laws 1986, c. 86-38, § 3, eff. Oct. 1, 1986; Laws (1986), c. 86-238, § 4, eff. Oct. 1, 1986.

847.013. Exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.

(1) Knowingly defined. – As used in this section "knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and content of any motion picture described herein which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show described herein, other than a motion-picture show, which is reasonably susceptible of being ascertained by the defendant, and

(b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

(2) Offenses and penalties. –

(a) It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and which is harmful to minors.

(b) The provisions of paragraph (a) do not apply to a minor when he is accompanied by his parents or either of them.

(c) It is unlawful for any minor to falsely represent to the owner of any premises mentioned in paragraph (a), or to his agent, that such minor is 17 years of age or older, with the intent to procure such minor's admission to such premises for a monetary consideration.

(d) It is unlawful for any person to knowingly make a false representation to the owner of any premises mentioned in paragraph (a), or to his agent, that he is the parent of any minor of that any minor is 17 years of age or older, with intent to procure such minor's admission to such premises or to aid such minor in procuring admission thereto for a monetary consideration.

(e) A violation of any provision of this subsection constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Injunctive proceedings. –

(a) The circuit court has jurisdiction to enjoin a threatened violation of subsection (2) upon complaint filed by the state attorney in the name of the state upon the relation of such state attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person or persons complained of until final hearing or further order of the court. Whenever the relator requests a judge of such court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within 3 days after the making of such request. No such order shall be made unless such judge is satisfied that sufficient notice of the application therefor has been given to the person or persons restrained of the time when and place where the application for such restraining order is to be heard. However, such notice shall be dispensed with when it is manifest to such judge, from the allegations of a sworn complaint or independent affidavit, sworn to by the relator or by some person associated with him in the field of law enforcement and filed by the relator, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person or persons sought to be enjoined shall be entitled to a trial of the issues within 1 day after joinder of issue, and a decision shall be rendered by the court within 2 days after the conclusion of the trial.

(d) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the relator state attorney before the issuance of a restraining order provided for by this section, and there

shall be no liability on the part of the state or the relator state attorney for costs or damages sustained by reason of such restraining order in any case in which a final decree is rendered in favor of the person or persons sought to be enjoined.

(e) Every person who has possession, custody, or control of, or otherwise deals with, any motion picture, exhibition, show, representation, or presentation described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents or character thereof.

(4) Legislative intent. – In order to make the application and enforcement of this section uniform throughout the state, it is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities, insofar as it concerns exposing persons under 17 years of age to harmful motion pictures, exhibitions, shows, representations, and presentations. To that end, it is hereby declared that every county ordinance and every municipal ordinance adopted prior to July 1, 1969, and relating to such subject shall stand abrogated and unenforceable on and after such date and that no county, municipality, or consolidated county-municipal government shall have the power to adopt any ordinance relating to that subject on or after such effective date.

Amended by Laws 1983, c. 83-77, § 3, eff. Oct. 1, 1983; Laws 1986, c. 86-38, § 4, eff. Oct. 1, 1986; Laws 1986, c 86-238, § 5, eff. Oct. 1, 1986.

847.0135. Computer pornography; penalties

(1) Short title. – This section shall be known and may be cited as the "Computer Pornography and Child Exploitation Prevention Act of 1986."

(2) Computer pornography. – A person is guilty of a violation of this section if he knowingly compiles, enters into, or transmits by means of computer, or makes, prints, publishes, or reproduces by other computerized means, or knowingly causes or allows to be entered into or transmitted by means of computer, or buys sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct.

(3) Penalties. – Any person who violates the provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided for in s. 775.082, s. 775.083, or s. 775.084.

Added by Laws 1986, c. 86-238, § 11, eff. Oct. 1, 1986.

847.06. Obscene matter; transportation into state prohibited; penalty

(1) Whoever knowingly transports into the state or within the state for the purpose of sale or distribution any obscene book; magazine; periodical; pamphlet; newspaper; comic book; story; paper; written or printed story

or article; writing; paper; card; picture; drawing; photograph; motion-picture film; figure; image; phonograph record, or wire or tape or other recording, or other article capable of producing sound; or any other matter of obscene character shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) When any person is convicted of a violation of this section, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

Amended by Laws 1979, c. 79-134, § 1, eff. June 5, 1979; Laws 1986, c. 86-238, § 8, eff. Oct. 1, 1986.

847.07. Wholesale promotion of obscene materials; penalties

(1) As ~~used~~ in this section, "wholesale promote" means to manufacture, issue, sell, provide, deliver, transfer, transmit, publish, distribute, circulate, or disseminate, or offer or agree to do the same, with or without consideration, for purposes of resale or redistribution.

(2) Any person who knowingly wholesale promotes any obscene matter or performance, or in any manner knowingly hires, employs, uses or permits any person to wholesale promote or assist in wholesale promoting any obscene matter or performance, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) No person shall, as a condition to sale, allocation, consignment, or delivery for resale of any matter or performance, require that the purchaser or consignee receive for resale any other matter or performance reasonably believed by the purchaser or consignee to be obscene; and no person shall deny or revoke any franchise, or threaten to do so, or impose or threaten to impose any penalty, financial or otherwise, by reason of the refusal or failure of any person to accept any such matter or by reason of the return thereof. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Amended by Laws 1983, c. 83-77, § 4, eff. Oct. 1, 1983; Laws 1986, c. 86-238, § 9, eff. Oct. 1, 1986.

FLORIDA RICO ACT

FLA. STAT. §§ 895.01-895.05

895.01. Short title

Section 895.01-895.06 shall be known as the Florida RICO (Racketeer Influenced and Corrupt Organization) Act.

895.02. Definitions

As used in ss. 895.01-895.08, the term:

(1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

1. Section 210.18, relating to evasion of payment of cigarette taxes.

2. Section 409.325, relating to public assistance fraud.

3. Chapter 517, relating to sale of securities and investor protection.

4. Section 550.24, s. 550.35, or s. 550.36, relating to dogracing, horseracing, and jai alai frontons.

5. Section 551.09, relating to jai alai frontons.

6. Chapter 552, relating to the manufacture, distribution, and use of explosives.

7. Chapter 562, relating to beverage law enforcement.

8. Section 655.50, relating to reports of currency transactions, when such violation is punishable as a felony.

9. Chapter 687, relating to interest and usurious practices.

10. Section 721.08, s. 721.09, or s. 721.13, relating to real estate time-share plans.

11. Chapter 782, relating to homicide.

12. Chapter 784, relating to assault and battery.

13. Chapter 787, relating to kidnapping.

14. Chapter 790, relating to weapons and firearms.

15. Section 796.01, s. 796.03, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution.

16. Chapter 806, relating to arson.

17. Chapter 812, relating to theft, robbery, and related crimes.

18. Chapter 815, relating to computer-related crimes.

19. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.

20. Section 827.071, relating to commercial sexual exploitation of children.

21. Chapter 831, relating to forgery and counterfeiting.

22. Chapter 832, relating to issuance of worthless checks and drafts.

23. Section 836.05, relating to extortion.

24. Chapter 837, relating to perjury.

25. Chapter 838, relating to bribery and misuse of public office.

26. Chapter 843, relating to obstruction of justice.

27. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

28. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.

29. Chapter 893, relating to drug abuse prevention and control.

30. Section 914.23, relating to retaliation against a witness, victim, or informant.

31. Sections 918.12 and 918.13, relating to tampering with jurors, evidence, and witnesses.

(b) Any conduct defined as "racketeering activity" under 18 U.S.C. s. 1961(1).

(2) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted:

(a) In violation of any one of the following provisions of law:

1. Section 550.24, s. 550.35, or s. 550.36, relating to dogracing, horseracing, and jai alai frontons.

2. Section 551.09, relating to jai alai frontons.

3. Chapter 687, relating to interest and usury.

4. Section 849.09, s. 849.14, s. 849.15, s. 849.23, s. 849.24, or s. 849.25, relating to gambling.

(b) In gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

(3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of

individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

(4) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

(5) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phono record, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(6) "RICO lien notice" means the notice described in s. 895.05(12) or in s. 895.07.

(7) "Investigative agency" means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(8) "Beneficial interest" means any of the following:

(a) The interest of a person as a beneficiary under a trust established pursuant to s. 689.07 or s. 689.071 in which the trustee for the trust holds legal or record title to real property;

(b) The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee

holds legal or record title to real property for the benefit of such person; or

(c) The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

The Term "beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or a limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(9) "Real property" means any real property or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(10) "Trustee" means any of the following:

(a) Any person acting as trustee pursuant to a trust established under s. 689.07 or s. 689.071 in which the trustee holds legal or record title to real property.

(b) Any person who holds legal or record title to real property in which any other person has a beneficial interest.

(c) Any successor trustee or trustees to any or all of the foregoing persons.

However, the term "trustee" does not include any person appointed or acting as a personal representative as defined in s. 731.201(25) or appointed or acting as a trustee of any testamentary trust or as a trustee of any

indenture of trust under which any bonds have been or are to be issued.

(11) "Criminal proceeding" means any criminal proceeding commenced by an investigative agency under s. 895.03 or any other provision of the Florida RICO Act.

(12) "Civil proceeding" means any civil proceeding commenced by an investigative agency under s. 895.05 or any other provision of the Florida RICO Act.

Renumbered as 895.02 in Fla.St.1981. Amended by Laws 1983, c. 83-65, § 1, eff. June 2, 1983; Laws 1983, c. 83-264, § 25, eff. July 1, 1983; Laws 1984, c. 84-9, § 2, eff. May 2, 1984; Laws 1986, c. 86-277, § 5, eff. Oct. 1, 1986; Laws 1987, c. 87-139, § 1, eff. Oct. 1, 1987.

895.03. Prohibited activities and defense

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3).

895.04. Criminal penalties and alternative fine

(1) Any person convicted of engaging in activity in violation of the provisions of s. 895.03 is guilty of a felony of the first degree and shall be punished as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of s. 895.03, through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2).

(4) For the purposes of subsection (2), "pecuniary value" means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything

else the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of $100.

895.05. Civil remedies

(1) Any circuit court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of s. 895.03 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of s. 895.03.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in

violation of s. 895.03 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2)(a) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05 is subject to civil forfeiture to the state.

(b) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall relate back:

1. In the case of real property or a beneficial interest, to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located; if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under s. 895.07(b)(a) in the official records of the county where the real property or beneficial interest is located; and if no RICO lien notice or notice of lis pendens is filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located.

2. In the case of personal property, to the date the personal property was seized by the investigating agency.

If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the

state, institute an action in any circuit court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

(c) The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The proceeds realized from such forfeiture and disposition shall be promptly distributed in accordance with the provisions of s. 895.09.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant.

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3), a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

(a) Place the property under seal.

(b) Remove the property to a place designated by court.

(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The Department of Legal Affairs, any state attorney, or any state agency having jurisdiction over conduct in violation of a provision of this act may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to

be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) The state, including any of its agencies, instrumentalities, subdivisions, or municipalities, if it proves by clear and convincing evidence that it has been injured by reason of any violation of the provisions of s. 895.03, shall have a cause of action for threefold the actual damages sustained and shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred. In no event shall punitive damages be awarded. The defendant shall be entitled to recover reasonable attorneys' fees and court costs upon a finding that the claimant raised a claim which was without substantial factual or legal support.

(a) Either party may demand a trial by jury in any civil action brought pursuant to this subsection.

(b) Any prevailing plaintiff under this subsection or s. 772.04 shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(8) A final judgment or decree rendered in favor of the state in any criminal proceeding under this act shall estop the defendant in any subsequent civil action or proceeding as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The Department of Legal Affairs may, upon timely application, intervene in any civil action or proceeding brought under subsection (6) or subsection (7) if he certifies that, in his opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding.

(10) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of this act, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) or subsection (7) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.

(11) The application of one civil remedy under any provision of this act does not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, and not mutually exclusive.

(12)(a) In addition to the authority to file a RICO lien notice set forth in s. 895.07(1), the Department of Legal Affairs, the Office of Statewide Prosecution, or the

office of a state attorney may apply ex parte to a criminal division of a circuit court and, upon petition supported by sworn affidavit, obtain an order authorizing the filing of a RICO lien notice against real property upon a showing of probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05. If the lien notice authorization is granted, the department shall, after filing the lien notice, forthwith provide notice to the owner of the property by one of the following methods:

1. By serving the notice in the manner provided by law for the service of process.

2. By mailing the notice, postage prepaid, by registered or certified mail to the person to be served at his last known address and evidence of the delivery.

3. If neither of the foregoing can be accomplished, by posting the notice on the premises.

(b) The owner of the property may move the court to discharge the lien, and such motion shall be set for hearing at the earliest possible time.

(c) The court shall discharge the lien of it finds that there is no probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05 or if it finds that the owner of the property neither knew nor reasonably should have known that the property was used in the course of, intended for use in the course of, derived from,

or realized through conduct in violation of a provision of ss. 895.01-895.05.

(d) No testimony presented by the owner of the property at the hearing is admissible against him in any criminal proceeding except in a criminal prosecution for perjury or false statement, nor shall such testimony constitute a waiver of the owner's constitutional right against self-incrimination.

(e) A lien notice secured under the provisions of this subsection is valid for a period of 90 days from the date the court granted authorization, which period may be extended for an additional 90 days by the court for good cause shown, unless a civil proceeding is instituted under this section and a lien notice is filed under s. 895.07, in which event the term of the lien notice is governed by s. 895.08.

(f) The filing of a lien notice, whether or not subsequently discharged or otherwise lifted, shall constitute notice to the owner and knowledge by the owner that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05, such that lack of such notice and knowledge shall not be a defense in any subsequent civil or criminal proceeding under this chapter.

PENALTY PROVISIONS

FLA. STAT. §§ 775.082-775.083

775.082 Penalties

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30 and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years;

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment;

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

775.083. Fines

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082; when specifically authorized by statute, he may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

(a) $15,000, when the conviction is of a life felony.

(b) $10,000, when the conviction is of a felony of the first or second degree.

(c) $5,000, when the conviction is of a felony of the third degree.

(d) $1,000, when the conviction is of a misdemeanor of the first degree.

(e) $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.

(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(g) Any higher amount specifically authorized by statute.

(2) If a defendant is unable to pay a fine, the court may defer payment of the fine to a date certain.

Supreme Court, U.S.
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No. 90-1486

IN THE
Supreme Court of the United States

October Term, 1990

TODD EDWARD LONG, PHYLLIS ANN MAXWELL, CATHY IRENE ARMSTRONG, EDWARD DEE ARMSTRONG, JOHN E. SHEA, AND CMH ENTERPRISES, INC.

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Does the application of the Florida Racketeering Influence and Corrupt Organization (RICO) Act to obscenity prosecutions create a chilling effect on the exercise of first amendment rights?

2. Is the Florida obscenity statute, Section 847.011, Florida Statutes, drafted in conformity with this Court's pronouncement in *Miller v. California,* 413 U.S. 15 (1973), unconstitutionally vague?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 6

The Florida Supreme Court did not address any question of federal constitutional law 6

The opinion from the Florida Supreme Court on the application of the RICO statutes to obscenity prosecutions does not conflict with any decision from another state court of last resort or any United States court of appeals and is in conformity with the decisions from this Court on the same issue 6

The decision of the Florida Supreme Court does not decide any important federal question which this Court has not settled and the Miller standard has been reaffirmed by this Court in *Pope v. Illinois,* 481 U.S. 497 (1987) 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 7, 8, 9, 10

Hamling v. United States, 18 U.S. 87 (1974) 10

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1983), *revd sub nom., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 8

Michigan v. Long, 463 U.S. 1032 (1983) 6

Miller v. California, 413 U.S. 15 (1973) . . . . . *passim*

Osborne v. Ohio, 495 U.S. _____, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) 10

Polykoff v. Collins, 816 F.2d 1326 (9th Cir. 1987) 8

Pope v. Illinois, 481 U.S. 497 (1987) . . . . . *passim*

Smith v. California, 361 U.S. 147 (1959) 7

Stall v. State, 570 So.2d 257 (Fla. 1990) 1, 5, 6

State v. Long, 544 So.2d 219 (Fla. 2d DCA 1989) . . . 1, 5

OTHER AUTHORITIES:

United States Constitution
Amendment 1 2
Amendment 14 2

Florida Constitution
Article I, Section 23 . . . . . 2, 6

Page

Florida Statutes
§ 847.011 . . . . . *passim*
§ 847.011(1)(a) 2
§ 895.02 3
§ 895.03 4
§ 895.04 4

Rule 3.701, Fla.R.Crim.P. 7

OPINIONS BELOW

The opinion of the Florida Supreme Court in this cause is reported as *Stall v. State,* 570 So.2d 257 (Fla. 1990), and the opinion of the Second District Court of Appeal reversing the ruling of the trial court is cited as *State v. Long,* 544 So.2d 219 (Fla. 2d DCA 1989). Both opinions have been reproduced in their entirety as Appendix A and B, respectively, in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution

Article I, Section 23. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Florida Statutes

Section 847.011(1)(a). Any person who knowingingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper,

comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion-picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 895.02. (1) Racketeering activity means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

28. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.

STATEMENT OF THE CASE

The Petitioners, and Tommie Stall, were charged in a forty-seven (47) count information in the Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida, with a number of offenses involving the hiring of persons to distribute obscene materials, distribution of an obscene movie, RICO, distribution of an obscene magazine, distribution of an obscene article or instrument, possession of obscene movies with intent to sell or distribute, possession of obscene instrument with intent to sell or distribute and possession of obscene magazine with intent to sell or distribute, in violation of Section 847.011, Florida Statutes, and Sections 895.03 and 895.04, Florida Statutes. A number of pretrial motions were filed including a motion to determine the reasonable man standard, a motion to dismiss alleging Section 847.011 violates Florida's right to privacy, a motion to dismiss alleging the statute does not conform to the requirements of *Miller v. California,* 413 U.S. 15 (1973) and *Pope v. Illinois,* 481 U.S. 497 (1987), a motion to dismiss for vagueness, a motion to dismiss alleging the obscenity statute provided for excessive punishment, insufficient scienter and had a chilling effect on first amendment rights.

Memoranda in opposition to these motions were filed by the State. A hearing was held before the Honorable E. Randolph Bentley was held on December 1-2, 1987. On January 8, 1988, Judge Bentley entered an order denying the motion to strike the jury list, denied the motion to dismiss for inability to seat a fair jury, modified the definition of a reasonable man, granted the motion to dismiss finding a right to privacy is violated when applied to material offered for sale or rent and intended for home use, denied the motion to dismiss for excessive punishment and insufficient scienter and granted the motion as having a chilling effect on first amendment rights. He also held the RICO statute as applied to obscenity to be violative of the

U.S. Constitution, declared the obscenity statute to be violative of due process because of vagueness, and found the obscenity statute did not conform to the requirements of *Miller* and *Pope*.

The State of Florida timely filed a notice of appeal, and briefed all of the points the trial judge had decided adversely to the State. The Second District Court of Appeal on March 31, 1989 filed an opinion, cited as *State v. Long*, 544 So.2d 219 (Fla. 2d DCA 1989), reversing the trial court and indicating the obscenity statute met constitutional muster. The district court specifically held that the statute did not violate the right to privacy under the Florida Constitution.

Further review was sought and had in the Florida Supreme Court. And that court found the Florida obscenity statute constitutional as it did not violate the Florida right to privacy. *Stall v. State*, 570 So.2d 257 (Fla. 1990). A Petition for Writ of Certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court did not address any question of federal constitutional law.

Certiorari review should be denied in this case since the Florida Supreme Court, the state court of last resort, did not address any federal constitutional issue. After citing to this Court's opinions which held that obscenity was not entitled to the full protection of the First Amendment, the Florida Supreme Court actually addressed and decided only the issue of whether or not the Florida Right to Privacy Amendment, Art. I, § 23, Fla. Const., protects the sellers and distributors of obscene material.

In holding that there is no right to publicly sell obscene materials, the court relied on its interpretation of a state constitutional provision. Thus it is clear that *Stall v. State, supra,* was decided on an independent and adequate state ground, and it is, therefore, not reviewable by this Court. *See, Herb v. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).

The opinion from the Florida Supreme Court on the application of the RICO statutes to obscenity prosecutions does not conflict with any decision from another state court of last resort or any United States court of appeals and is in conformity with the decisions from this Court on the same issue

Both the Florida Supreme Court and Second District Court of Appeal, in addressing the petitioners' claim that the use of the Florida Racketeering Influence and Corrupt Organization (RICO) Act on obscenity prosecutions had a chilling effect on the exercise of First Amendment rights, looked to the decisional law from this Court in finding that the

application of this statute was constitutionally permitted. No other pronouncement beyond acknowledgment of this Court's cases was made by the Florida Supreme Court. Both courts cited to this Court's opinion of *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989), as authority that obscenity offenses may be used as predicate acts under RICO prosecutions. In *Fort Wayne Books* the defendants argued, as do the petitioners *sub judice,* that the harsher penalties under RICO placed an unconstitutional chilling effect on the exercise of First Amendment rights. However, this Court held that neither the possibility of harsher penalties nor the possibility of self-censorship results in a violation of the First Amendment. *See also, Smith v. California,* 361 U.S. 147 (1959).

There is no dispute that under Florida Law penalties for violating the RICO statute are more severe than the penalties outlined in the obscenity statute. But, petitioners' argument that the potential 30 year sentence under RICO is imposed for as few as two obscenity violations overlooks other important aspects of the RICO statute. That statute is a tool used to convict and punish those persons who have demonstrated a continuing course of criminal conduct, *i.e.,* an enterprise. It is not enough under a RICO prosecution that one engage in any of the predicate offenses, including obscenity violations only once. The State, via the State Attorney, must not only prove the defendant engaged in the prohibited activities at least twice, the State must also plead and prove "a pattern of racketeering activity" and "an enterprise."

Once the State Attorney has proven all of the elements of a RICO violation, pattern of racketeering, enterprise, and at least two predicate offenses, the Florida Sentencing Guidelines would then come into play. Rule 3.701, Florida Rules of Criminal Procedure, by its own terms, is applicable to a RICO conviction since the guidelines are to be used in

all noncapital cases, and a prosecution under RICO is noncapital. In this case, the guidelines would result in sentences much less severe, including any nonstate prison sanction, than the "draconian" sanctions these petitioners argue.

The petitioners' extra-record reference to a newspaper article concerning the number of x-rated videos available on the market, if true, demonstrates in part the error of their chilling effect argument. It would appear from such statistics that many are not deterred despite the possibility of severe punishments.

Petitioners attempt to argue conflict pursuant to Supreme Court Rule 10.1(b) with a decision from a United States court of appeals is not persuasive. Rather than supporting conflict, the ninth circuit's opinion of *Polykoff v. Collins,* 816 F.2d 1326 (9th Cir. 1987), while decided prior to *Fort Wayne Books,* is in conformity with that case. The ninth circuit in *Polykoff* actually held that the huge potential felony fines of $150,000.00 and $1,000,000.00 did not have an unconstitutional chilling effect on free speech. That court went on to say that any chilling effect was attributable to the state's legitimate deterrent goals.

Likewise, *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d 482 (9th Cir. 1983), *revd sub nom., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491 (1985), does not aid petitioners' conflict argument. First, the case did not involve an interpretation of a RICO statute as applied to obscenity. Secondly, the state statute involved concerned fines which were based in part on constitutionally protected activity.

Neither of the cases relied on by the petitioners can be used to demonstrate conflict among the courts. Neither *J-R Distributors, Inc.* nor *Polykoff* involved a RICO prosecution. And even if it could be argued that the same principles are applicable because the court discussed the chilling effect of penalties on the exercise of First Amendment rights, both of

the cases were decided before this Court rendered its opinion in the *Fort Wayne Books* case.

The argument that this Court should look at this case and re-examine *Miller v. California,* 413 U.S. 15 (1973), because of the changing moral or social climate, has been repeatedly argued and rejected and should be rejected in this case. This Court has recognized by the very standards outlined in *Miller* that what appeals to the "prurient interest" or is "patently offensive" cannot be precisely defined for all states and/or communities. Thus, the first prong of the *Miller* standard is "whether the average person, applying *contemporary community standards* would find that the work taken as a whole, appeals to the prurient interest." Such a standard takes into consideration the "social changes" argument.

Respondent cannot agree that obscene videos have become a staple of the American home video marketplace. References to magazine and journal articles do not constitute proof of the matters contained therein. Contrary to the assertions being made by petitioners, the evidence suggests that obscenity is not being embraced by society. The strengthening of obscenity statutes and their vigorous enforcement points up the fact that society is concerned about the continued distribution of obscene materials in their communities.

Petitioners have failed to properly invoke this Court's jurisdiction by presenting an issue worthy of certiorari review.

The decision of the Florida Supreme Court does not decide any important federal question which this Court has not settled and the Miller standard has been reaffirmed by this Court in *Pope v. Illinois*, 481 U.S. 497 (1987)

Despite petitioners' grudging acknowledgment, *Miller v. California,* 413 U.S. 15 (1973), continues to be the standard as articulated by this Court for prosecution of obscenity cases. All of the recent cases from this Court have upheld the states' right to prosecute obscenity law violations and in each instance have reaffirmed *Miller. See, e.g., Hamling v. United States,* 418 U.S. 87 (1974); *Pope v. Illinois,* 481 U.S. 497 (1987); *Fort Wayne Books, Inc. v. Indiana, supra,* and *Osborne v. Ohio,* 495 U.S. _____, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990).

These petitioners have not presented any legitimate bases for a re-examination of the *Miller* standard. The mere fact that some state courts have found independent state ground reasons for invalidating their obscenity laws does not support a claim that *Miller* has fallen into disrepute. The decisions by the Hawaii court and the Oregon court were not grounded on the opinions from this Court. Rather, those courts chose to interpret their own constitutions in a manner which would allow for invalidating the statutes.

These petitioners also argue the *Miller* standard does not require meaningful scienter. While they concede there is a requirement of knowledge of the contents, character and nature of the materials, they want more without any cause for complaint. The more knowlege desired by the petitioners is that the state prove knowledge of the material's status as obscenity. But isn't the material's status a question to be decided by the jury? If the State could automatically make that decision instead of the jury, petitioners would be before this Court with a different set of arguments.

The argument that jurists differ on the meaning of obscenity has been espoused by various parties since *Miller*. And this Court in *Miller* said:

> The mere fact juries may reach different conclusions as to the same material, does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States,* 354 US, at 492 n 30, 1 L Ed 2d 1498 "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system".

37 L.Ed.2d at 432.

The opinions expressed in dissents are just that, differences of opinion. These differences of opinions appear with frequency in our system of laws. However, to elevate them to the status of being the law defeats the whole purpose of our system. The majorities in *Miller* and *Pope* recognize the problems inherent in defining obscenity; the difficulty of the task does not negate the effectiveness of the standard which has proven workable. Both Congress and the Florida legislature have addressed an ill which cuts to the fabric of our society. These laws have been drawn with enough flexibility to protect individual rights while also protecting the society as a whole.

The fact that petitioners do not agree with *Miller* and its progeny is not a basis for certiorari review.

CONCLUSION

For the foregoing reasons, Respondent submits the Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

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